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IN THE

Supreme Court of the United States

KLAMATH DRAINAGE DISTRICT; KLAMATH WATER USERS PROTECTIVE ASSOCIATION; SAM HENZEL; HENZEL PROPERTIES, LTD.,

Petitioners,

v.

ROGER PATTERSON; KARL E. WIRKUS; ELUID MARTINEZ; PATRICIA BENEKE; BRUCE BABBITT; UNITED STATES BUREAU OF RECLAMATION; UNITED STATES OF AMERICA; PACIFICORP; YUROK TRIBE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court, pursuant to Supreme Court Rules 10(a) and 16.1, should summarily vacate a section of a Ninth Circuit decision recognizing the Bureau of Reclamation's power and duty to reallocate water in favor of unadjudicated tribal water rights claims, and further recognizing a priority date of time immemorial for certain claimed tribal rights, based on a misreading of an earlier decision of that court in which the rights of those tribes were not implicated, where these issues were in no way presented, briefed, or argued before the court in this case, and where the decisions of this Court strongly counsel restraint by federal courts in the determination of water right priorities.

PARTIES TO THE PROCEEDINGS

All of the parties below are listed in the caption. Petitioner Klamath Water Users Protective Association is a not-for-profit corporation and has no related corporate entities. Henzel Properties, Ltd., is not publicly traded and has no related corporate entities.

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PETITION FOR A WRIT OF CERTIORARI

Klamath Drainage District, Klamath Water Users Protective Association, Sam Henzel; and Henzel Properties, Ltd., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-13a) is published at 204 F.3d 1206 (9th Cir. 2000). The order of the court of appeals denying Petitioner's petition for rehearing with suggestion for rehearing *en banc* and amending the original opinion is reported at 203 F.3d 1175 (9th Cir. 2000). The Memorandum Decision and Order of the district court (Pet. App. 14a-26a) is reported at 15 F. Supp. 2d 990 (D. Ore. 1999)

JURISDICTIONAL STATEMENT

The jurisdiction in the district court over claims against the United States and federal officers and agencies was invoked pursuant to 28 U.S.C. §§ 1331, 1346(a)(2), 1361, 1491, 2201-02 and 43 U.S.C. § 390uu. Jurisdiction over claims against PacifiCorp was invoked pursuant to 28 U.S.C. §§ 1331 and 1367. The judgment of the court of appeals was entered September 9, 1999. The order denying the petition for rehearing with suggestion for rehearing *en banc* and amending the original judgment was entered January 28, 2000. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 8 of the Reclamation Act of 1902, Act of June 17, 1902, 32 Stat. 388 is codified in two sections of the United States Code.

43 U.S.C. § 372 (1994) provides:

Water right as appurtenant to land and extent of right

> The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land

irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

43 U.S.C.§ 383 provides:

Vested rights and State laws unaffected

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the Control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

The McCarran Amendment, 43 U.S.C. § 666(a) provides:

Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to

the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

STATEMENT

This petition is filed on behalf of irrigators[1] with rights to water delivered through the Klamath Project in Oregon,[2] who ask this Court to summarily vacate, pursuant to Supreme Court Rules 10(a) and 16.1, one section—three paragraphs—of a decision of the United States Court of Appeals for the Ninth

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[1] The petitioners who are irrigators in the Klamath Project use water from Upper Klamath Lake and the Klamath River. Petitioner Klamath Water Users Protective Association does not use water or claim to have water rights.

[2] Vested water rights for irrigation and domestic use in the Klamath Project are recognized in the Klamath River Basin Compact Act of August 30, 1957, 71 Stat. 497, Art. III. Settlers began irrigation in this area in the nineteenth century. In 1902, Congress enacted the Reclamation Act, Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. § 372 *et seq.* (1994)), to encourage further western settlement and agricultural development by providing federal financing for irrigation projects. In 1905, the state of Oregon enacted legislation making water available for use in Reclamation projects, 1905 Or. Laws Ch. 228, and specifically authorizing storage of water for reclamation and irrigation purposes within Upper Klamath Lake. Ch. 5, Or. Laws of 1905, Sec. 1. That same year Congress specifically authorized the development of the Klamath Irrigation Project, Act of February 9, 1905, 33 Stat. 714. Early construction on the Project consisted of building canals and extending existing canals. Project water at that time was drawn from several lakes and rivers in the area, and pre-existing water rights were acquired to support it. Since the initiation of the Project, Reclamation has entered into 250 contracts, providing for delivery of water, with various individuals, irrigation districts, drainage districts or similar entities for use by approximately 230,000 acres of irrigated land. (Pet. App. 16a.) In some instances, water use by districts and individuals derives from appropriative uses tracing back to the nineteenth century.

Circuit.[3] The section at issue purports to resolve important questions concerning the existence and priority of water rights in the Klamath River Basin which are no part of the dispute before that court. First, without the benefit of briefing or argument on the issue, the Ninth Circuit has decided a hotly disputed question of Bureau of Reclamation authority. Second, it has characterized the water rights and priorities of several Indian tribes based on a clear misstatement of its own prior precedent. Petitioners seek a summary order remanding with instructions to vacate this portion of the opinion, as addressing issues not presented for decision and including indisputable factual errors, concerning matters of great importance to the determination of water rights throughout the West, and in the Klamath River Basin, in particular.

The Basin straddles the Oregon-California border, from Crater Lake in the north to the Trinity River in the south, and from Klamath and Modoc Counties in the east to the Pacific Ocean. See Exhibit 1 (Map of Klamath River Basin) (Pet. App. 27a). It covers roughly ten million acres and has been statutorily divided into upper and lower basins of nearly equal size. *See* Klamath River Basin Compact of August 30, 1957, 71 Stat. 497, Art. II.B. Within the upper basin, at the foot of Upper Klamath Lake, is the Link River Dam, from which water flows into the Klamath River. The Dam is owned by the Bureau of Reclamation and operated under contract by PacifiCorp. The interpretation of a 1956 contract for the operation of that Dam was at issue in this case.[4]

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[3] The section at issue is Section II.B.3, headed "Indian Water Rights." (Pet. App. 12a-13a)

[4] PacifiCorp is the second operator of the Dam under contract with the Bureau of Reclamation. In 1917, the United States and the California Oregon Power Company (COPCO) entered into an agreement whereby COPCO would construct the Link River Dam at the mouth of Upper Klamath Lake to store water for irrigation and downstream power generation, and then convey title to the Dam to the United States. (Pet.

In Oregon, upstream from the Lake, at the northeastern end of the upper basin, is the Williamson River watershed, within the former reservation of the Klamath Tribe, whose rights to instream flows in that watershed were established and prioritized by the Ninth Circuit in *United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir. 1983). In California, at the far southwestern edge of the lower basin, near where the Klamath enters the Pacific Ocean, are the reservations of the Yurok and the Hoopa Indians, whose rights to water from the Klamath have never been addressed by any court prior to this case. (*See* Pet. App. 27a)

The State of Oregon is conducting a general stream adjudication that will determine and quantify rights and priorities to use waters of the Klamath River system in Oregon. The adjudication was delayed pending the outcome of *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), in which the Ninth Circuit held that Oregon's system of adjudication was within the waiver of sovereign immunity of the McCarran Amendment, 43 U.S.C. § 666, and thus that federal agencies and the Klamath Tribe must file claims in that adjudication. By 1997, all claims had been filed in that case.

Until the early 1990s, the Link River Dam was operated principally to ensure adequate water for irrigation in the Klamath Project, which lies southeast of the Lake. ER 59-60, 78-79.[5] Various Indian tribes, including the Yurok and Hoopa

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App. 15a) The Dam was completed in the early 1920s. The fifty-year contract allowed COPCO to operate the Dam; this contract was renewed in 1956 and remains in effect until 2006. *Id.* COPCO was succeeded by PacifiCorp subsequent to 1956. Under the terms of the 1956 contract, PacificCorp may regulate the elevations of Upper Klamath Lake within specified limits and subject to certain requirements set by the Bureau of Reclamation. (Pet. App. 16a)

[5] "ER" refers to Excerpts of Record in the court below; "SER" to Supplemental Excerpts of Record; "FER" to Further Excerpts of Record.

Tribes, then made demands on the Bureau of Reclamation to provide higher flows in the Klamath River, asserting water rights to support tribal fisheries. ER 61-63. Also, the Klamath Tribe of the upper basin claimed to have a water right in Upper Klamath Lake itself, and insisted that more water should be retained in the Lake to benefit the Klamath Tribe's fisheries. During the early 1990s, the Bureau of Reclamation began exploring new approaches to managing the Dam in light of these claims.

This effort led, in 1997, to a new interim plan for Dam management that would first allocate fixed quantities of water to high instream Klamath River flows and high Upper Klamath Lake levels, and leave to the Klamath Project irrigators only the water left over after these requirements were met. As a result of the plan, the Bureau of Reclamation and PacifiCorp entered into an agreement modifying the 1956 contract.[6] In June 1997, petitioners filed suit to challenge that modification. The suit was brought against the United States, the Bureau of Reclamation, several Government officials, and PacifiCorp, based in part on the assertion that petitioners were third party beneficiaries under the 1956 contract, so that it could not be amended without securing their approval. (Pet. App. 5a)

Following denial of petitioners' requested temporary restraining order, all of petitioners' remaining claims were ultimately dismissed, on petitioners' motion for dismissal without prejudice and on mootness grounds. (Pet. App. 14a; ER 587-88.) The case proceeded on what the district court

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[6] The modification was agreed to after PacifiCorp declined to implement Reclamation's 1997 interim plan for operation of the Dam. This refusal resulted from a number of factors including, as reported by the district court, the fact that the plan required PacifiCorp to violate requirements of its FERC license pertaining to minimum flows in the river during September. (Pet. App. 18a) The challenged amendment was a short-term modification of the 1956 contract directing implementation of the interim plan with FERC's concurrence. *Id.*

characterized as "the sole remaining substantive matter" of PacifiCorp's amended counterclaim seeking "a declaration of petitioners' rights under the 1956 contract." (Pet. App. 14a) On cross motions for summary judgment, the district court ruled for PacifiCorp and against petitioners, holding that petitioners had no rights under the 1956 contract, and in the process adopted verbatim the three declarations requested by PacifiCorp:

> (1) plaintiffs are not third party beneficiaries to the 1956 contract with respect to irrigation water, and the contract creates no rights in plaintiffs to irrigation water; (2) the 1956 contract may be amended with regard to PacifiCorp's rights and obligations to operate Link River Dam without plaintiffs' consent; and, (3) PacifiCorp is not liable to plaintiffs under the 1956 contract for implementing Federal defendants' water allocation decisions for the Klamath Project.

(Pet. App. 25a-26a)

The district court reached these conclusions by reviewing the terms of the 1956 contract and finding that petitioners were indirect and incidental beneficiaries of the contract, and thus were not entitled to third party beneficiary status. The court also observed that petitioners' rights to receive water through the Klamath Project derived not from the 1956 contract, but primarily from individual repayment contracts with the federal government, which contained a clause holding the government harmless in the event of a shortage. (Pet. App. 20a-24a) Under these circumstances, the court concluded that allowing petitioners to bring suit under the 1956 contract "would be inconsistent and is not supported by the record." (Pet. App. 25a)

In a final paragraph immediately preceding the section of the decision labeled "Conclusion," the district court listed a number of other factors weighing against recognizing rights in

petitioners to sue as third party beneficiaries under the contract. The last of these, as stated by the district court, was that

> [petitioners'] rights to water in the basin, whether as third party beneficiaries to the 1956 contract or under their individual repayment contracts with Reclamation, are subservient to senior tribal water rights and to subsequent legislative enactments by Congress, such as the Endangered Species Act.[7]

(Pet. App. 25a)

On appeal to the Ninth Circuit, petitioner expressly urged the court to confine itself to the issue of contract construction, which the district court had described as the sole remaining issue in the case, and to clarify that the lower court's language set forth above did not resolve water rights issues that were not presented:

> Water rights matters are complex, sensitive, and being adjudicated in another forum. They were not in issue here, where the question is whether plaintiffs have rights under the 1956 contract with respect to PacifiCorp's operation of the dam. Plaintiffs urge this Court to take all necessary steps to ensure that the holding in this case is limited to the contract in issue, and cure the district court's uncareful repetition of conclusory assertions that were not litigated.

Appellants Opening Brief at 61. This request was fully consistent with the language of PacifiCorp's counterclaim,

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[7] The other factors noted in the same paragraph were that "Article 15 limits intended beneficiaries to the parties to the contract;" that Petitioners' arguments, if accepted, would mean that "most users of Klamath Project water would stand as intended third party beneficiaries to the . . . contract;" and that "the 1956 contract did not give [petitioners] water rights superior to those in [petitioners'] individual repayment contracts with Reclamation." (Pet. App. 25a)

which sought nothing other than a declaration of petitioners' rights arising under the 1956 contract (Pet. App. 14a), and with the district court's summary of the issue presented and its own ruling. (Pet. App. 14a, 25a-26a)

The United States' opposition brief agreed with petitioners' definition of the issue presented:

> The issue presented in this appeal is straight-forward: Does a 1956 contract between [the Bureau of Reclamation] and [Pacificorp's predecessor] give appellants . . . rights to irrigation water under the Contract as third party beneficiaries?

U.S. Br. at 3.[8] In response to petitioners' concern about the single sentence of the district court opinion referencing tribal water rights, the United States acknowledged that the district court may have "made statements regarding issues not in dispute or outside its jurisdiction," but said that this Court need not concern itself with correcting them because such "statements are not binding." *Id.* at 58 n.32.

In a brief submitted to the Ninth Circuit as an intervenor, the Yurok Tribe argued that the district court's reference to "senior tribal water rights" should be viewed as a recognition "(1) that the Yurok and other Klamath Basin tribes hold vested, existing reserved water (and fishing) rights," and (2) that the "Bureau of Reclamation must be allowed the discretion necessary to protect and satisfy them," to the extent senior rights "can be estimated . . . based on the best scientific information available." Yurok Br. at 32. The Yuroks emphatically denied that the district court's language in this respect was dicta, *id.* at 33, and vigorously argued to the Ninth

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[8] This repeated the United States' position, asserted in the district court, that "[t]he only rights at issue before the Court are those contractual rights which Copco and the United States intended to create in their agreement over forty years ago." ER 517.

Circuit that "the Yurok Tribe has an aboriginal water and fishing right, reserved and vested no later than 1855, that is senior to the Irrigators' water rights." *Id.* at 43.

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the district court. The court stated at the outset that the case was limited to "a basic contract issue: whether [petitioners] are third-party beneficiaries to [the 1956 contract]," (Pet. App. 2a) and ruled without qualification that they were not:

> Although the Contract operates to the Irrigator's benefit by impounding irrigation water, and was undoubtedly entered into with the Irrigators in mind, to allow them intended third party beneficiary status would open the door to all users receiving a benefit from the Project achieving similar status, a result not intended by the Contract. Accordingly, we hold that the Irrigator's are not intended third party beneficiaries.

(Pet. App. 9a-10a)

Thereafter, the court proceeded to address several additional issues.[9] In a separate section labeled "3. Indian Water Rights,"

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[9] First, in a subsection labeled "1. Control of the Dam," the court stated that the contract evinced "the unmistakable intent that Reclamation controls the Dam." (Pet. App. 10a-11a) The court explained that this section was a response to petitioners' argument that the district court erred in granting PacifiCorp immunity from suit because PacifiCorp and not Reclamation has the right to control release of water from the dam. Second, in a subsection labeled "2. Endangered Species Act," offered as a response to petitioners' argument that PacifiCorp had no duty to operate the dam so as to comply with the Endangered Species Act, the court stated that "[b]ecause Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency." (Pet. App. 11a-12a) Accordingly, the court "[held] that the district court did not err in concluding that Reclamation has the authority to direct dam operations to comply with the ESA." *Id.* Neither of these sections is challenged by this petition.

ostensibly offered in response to petitioners' assertion that tribal water rights were irrelevant to the contract construction issue, the court went far beyond the general observation of the district court to address specifically the issues of Bureau authority and tribal water rights. (Pet. App. 12a) The court cited its own decision in *United States v. Adair*, 723 F.2d at 1408-11, 1415, which it described parenthetically as "holding that the Klamath Basin Tribes hold implied water rights to support hunting and fishing rights guaranteed by treaties between Tribes in Oregon and California and the United States." (Pet. App. 12a) The court proceeded to state that:

> We have held that water rights for the Klamath Basin Tribes "carry a priority date of time immemorial." *Adair*, 723 F.2d at 1414. Because Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators.

(Pet. App. 12a-13a)

Petitioners, with the direct support of an *amicus* brief by the State of Oregon, sought panel and *en banc* rehearing, asserting specifically that the panel had gone "far beyond" the issue of petitioners' rights under the 1956 contract, to decide questions "not joined by the pleadings" or litigated by the parties.[10] Petition for Rehearing or Modification at 4. Petitioners asserted, first, that the panel should not have addressed the issue "of national significance" concerning whether Reclamation has authority to "direct operation of the Dam to serve asserted [but as yet unadjudicated] Tribal water rights."

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[10] The rehearing petition challenged the panel decision in other respects as well, including its resolution of the third party beneficiary issue and its discussion of Reclamation's obligations under the Endangered Species Act.

Id.[11] Petitioners noted further that the court erroneously characterized its own prior decision in *United States v. Adair*, in saying that that decision addressed the water rights of "the Klamath Basin Tribes" "in Oregon and California," which "carry a priority date of time immemorial." (Pet. App. 12a) Petitioners pointed out that the panel's reference on its face encompassed the tribes of the Klamath Basin in both states, including the Klamath Tribe and the Yurok and Hoopa Indians, but that the *Adair* case addressed water rights of only the Klamath Tribe in the Williamson River watershed in Oregon. Rehearing Petition at 5. The Yuroks and Hoopas were not parties in *Adair*, and nothing in the decision suggested that their rights were in any way addressed.

Petitioners further noted that even as to the Klamath Tribe, *Adair* addressed only the right to instream flows in the Williamson River watershed, and did not deal with any claimed water rights of that Tribe in Upper Klamath Lake, which Reclamation had recognized in the interim plan endorsed by the panel. Rehearing Petition at 5.[12] In addition, during the

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[11] This concern was echoed by the State of Oregon in its *amicus* brief submitted on rehearing:

> The extent of Reclamation's authority to allocate water within its projects to serve . . . tribal trust obligations, and the relationship between those obligations and water rights acquired or decreed under state law, [is an] issue[] of enormous significance throughout the western states . . . Oregon's point is that [that issue was] not litigated on the merits by the other parties in this case, nor is [its] resolution necessary to resolve the third-party beneficiary issue, . . . the only legal issue before this court.

Amicus Brief of State of Oregon at 9 (Oregon Br.). Because the issue had not been presented or briefed earlier, this was the first and only filing in the case by the State of Oregon.

[12] A tribal right to have water remain in the Williamson River is highly complimentary to the rights of petitioner irrigators, because it increases the amount of water flowing into Upper Klamath Lake, and thus available

pendency of the rehearing petition, petitioners filed a letter under FRAP 28(c) to correct mischaracterizations by the Yurok Tribe in their opposition to rehearing, related to the same misstatements of the *Adair* decision. Letter of December 29, 1999.

On January 28, 2000, the Ninth Circuit issued an order adding to its opinion footnote 3, restating its recognition of Reclamation's power to allocate water to unadjudicated tribal claims, and leaving unchanged the factually erroneous statements in its opinion:

> 3. An adjudication of all of the rights to the use of the surface waters of the Klamath River Basin ("Basin"), within the State of Oregon, is now pending in state court. *See United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994). That is a comprehensive water rights adjudication contemplated by the McCarran Amendment, 43 U.S.C. § 666, and questions of relative amounts and priorities, at least within the State of Oregon, will be decided there. Our decision in this case and that of that district court relate only to questions involving the Bureau's operation and management of the Project, and not to the relative rights of others not before the court to the use of the waters of the Basin.

(Pet. App. 2a)

REASONS FOR GRANTING THE WRIT

Although this case arose from a dispute about whether petitioners are third party beneficiaries with rights against PacifiCorp under the 1956 contract for operation of the Link River Dam, the Ninth Circuit reached out to affirm

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for potential use by Klamath Project irrigators obtaining water from the Lake. A tribal right to a certain level of water in Klamath Lake would have the opposite effect of reducing the amount of water that may be removed from the Lake to meet irrigation needs.

Reclamation's authority, in controlling the operation of the Dam, to give priority to unadjudicated tribal claims, and in the process erred in two important and certworthy respects. First, it made an unsolicited judicial pronouncement on the general power of the Bureau of Reclamation to determine and allocate water based on unadjudicated tribal claims ahead of statutorily-recognized water rights of Klamath Project irrigators served through contracts. *See* note 2, *supra*. Second, the court declared the existence and specific priorities of certain tribal water rights, without any litigation or consideration of the relevant facts.

The United States and the Bureau of Reclamation, who were before the court in this case, at no time requested a declaration of their powers or obligations, under the 1956 contract or in general. No party ever pleaded a cause of action concerning the authority of Reclamation to operate the Dam in a manner recognizing unadjudicated tribal water rights to in-stream flows, or sought a determination of the existence or priority of any tribal rights. As a result, these issues were not litigated by the parties to the case, and no other parties—such as the State of Oregon—had notice that such issues might be resolved.

As this Court enunciated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976), the involvement of federal courts—or presumably federal agencies like the Bureau of Reclamation—in the determination of water rights, must proceed in recognition of "the availability of comprehensive state systems for adjudication of water rights." Indeed, as this Court has held, Congress expressly elected, in the Reclamation Act of 1902 and later enactments, to "defer to state law" in this area, and did so precisely because of "the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." *California v. United States*, 438 U.S. 645, 669 (1978). While *Colorado River* did not announce

an inflexible rule against federal court involvement in determining water rights issues, it recognized a "clear federal policy," rooted in the McCarran Amendment, of avoiding "piecemeal adjudication of water rights in a river system." *Colorado River*, 424 U.S. at 819. That policy has been understood as a counsel of restraint to federal courts, requiring them to avoid determination of such rights, at least where, as here, there is an ongoing state stream adjudication, in the absence of strong counterveiling considerations. The fact that the water rights of Indian tribes may be at issue is not, in itself, a sufficient basis justifying the federal court to proceed. *Id.* at 812; *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 (1983).

In this case, there were no such counterveiling considerations which might arguably justify the Ninth Circuit in deciding issues relating to the Bureau's power or duty to recognize unadjudicated tribal claims, or to declare the existence and particular priority to be accorded to specific tribal water rights claims. Indeed, these issues were no part of the dispute before the court—a dispute between PacifiCorp and petitioners about whether petitioners had any claims against PacifiCorp under the 1956 contract concerning operation of the Dam. No one requested declaratory or other relief concerning the propriety of Reclamation's 1997 interim plan, and the specific priorities of the tribal claims are entirely unrelated to any claim that petitioners could conceivably have against PacifiCorp under the contract.[13] On the facts, the Ninth Circuit's inclusion of Section II.B.3 appears not even to be any part of the resolution

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[13] This is most emphatically true in view of Ninth Circuit's unequivocal rulings 1) that petitioners have no rights at all under the 1956 contract; and 2) that the Bureau of Reclamation ultimately controls the operation of the Dam. (Pet. App. 10a-11a)

of the justiciable controversy presented for decision.[14] Accordingly, the court has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a).

Moreover, the issues that the Ninth Circuit purports to resolve in Section II.B.3 are of great consequence, not merely to petitioners and others with water rights in the Klamath Basin, but to states throughout the West and to everyone who is dependent in their lives or livelihoods on vested rights to water. This Court has long since recognized that such rights—including those that are realized only through the vehicle of federal water projects—have the status of property belonging to the land-owners, and not to the Government simply because it owns the irrigation works. *Nebraska v. Wyoming*, 325 U.S. 589, 613-14 (1945) ("The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals" and belongs to the appropriator); *Ickes v. Fox*, 300 U.S. 82, 95 (1937) ("the water rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works.") Water rights of irrigators drawing from federal projects thus are not "like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit." *Nevada v. United States*, 463 U.S. 110, 126 (1983).

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[14] Certainly, the two issues addressed in Section II.B.3 were "not pressed before the court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). The Ninth Circuit has thus ignored the admonition that "[t]he judicial power does not extend to the determination of abstract questions." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 324 (1936); *Muskrat v. United States*, 219 U.S. 346, 361 (1911).

I. The Ninth Circuit Has Decided An Important Question Of Federal Versus State Authority Concerning Determination Of Water Rights That Was Not Presented Or Litigated In This Case, And That Is Presently A Matter Of Open Discussion Between The Federal Government And The States

The power (and obligation) of the Bureau of Reclamation that the Ninth Circuit recognizes here, to give priority to unadjudicated tribal water rights claims, is highly disruptive to any predictable scheme for fairly regulating water rights in accordance with their legal priorities. The issue raises a substantial federalism question, between Reclamation's authority and that of the states, whose law, it was "clearly provided" in the Reclamation Act of 1902, "control[s] in the appropriation and later distribution of [project] water." *California v. United States*, 438 U.S. at 664.

The filing by the State of Oregon in support of rehearing before the Ninth Circuit is thus hardly surprising. Oregon might well have become involved sooner, had it not been clear that the issue of the Bureau's asserted power to recognize unadjudicated tribal rights was in no sense presented in this case. Oregon's prayer upon rehearing was a modest one—that the issue "of enormous significance," of "Reclamation's authority to allocate water within its projects to serve . . . tribal trust obligations," not be decided in a case where it is neither presented nor litigated by the parties. Oregon Br. at 9.

Oregon's request, which the Ninth Circuit rejected, is especially appropriate given the developing history of administrative interaction between responsible State and Federal agencies, which is framing the issue for a possible future judicial resolution. That history traces back to at least 1995, when, on July 25, the Department of Interior's Regional Solicitor for the Pacific Southwest Region, David Nawi, issued a legal memorandum of advice to the Bureau of Reclamation concerning its oversight of the Link River Dam. (Pet. App.

29a-41a) In the memorandum, he directed the Bureau to "exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights," even though "[n]one of the rights [in issue] are quantified." (Pet. App. 41a)

Cognizant of that directive, on March 18, 1996, Oregon Assistant Attorney General Stephen E. A. Sanders wrote a letter to the Director of the Oregon Water Resources Department, directly challenging the conclusion of the Regional Solicitor asserting such power in the Bureau of Reclamation. (Pet. App. 42a-55a) Three primary grounds were advanced. First, the Assistant Attorney General noted that there was no statutory or other authority justifying Bureau action "to regulate water uses under the prior appropriation doctrine," and that the "purpose of the McCarran Amendment was to require federal and tribal participation in the states' water rights systems." (Pet. App. 48a) Second, he observed that the claimed rights in issue have not been adjudicated, and "regulation in favor of a water right necessarily requires a determination of what the right is." Citing *South Delta Water Agency v. United States*, 767 F.2d 531 (9th Cir. 1985). (Pet. App. 48a-50a)

Third, the Assistant Attorney General noted that, "[t]o be fair and effective, any system of regulation between rights in a prior appropriation system must necessarily include all holders of water rights," since in times of shortage junior users must give way to more senior users. (Pet. App. 50a) "The Bureau identifies no way that it can shut off junior users who are not under direct federal control, to satisfy the calls of senior appropriators. Only the state has [that] authority. . . ." (Pet. App. 50a-51a) As a result, he observed, Reclamation's asserted power would result in the Klamath Project irrigators being subordinated to a variety of more junior users who are affected by federal control of the Dam.

On January 9, 1997, Regional Solicitors' Nawi and Lynn Peterson (for the Pacific Northwest Region) responded directly to Assistant Attorney General Sander's letter, which they said was "in wide circulation and may be read as calling into question the legal basis for various federal actions to manage the Project." (Pet. App. 56a-70a) The Regional Solicitors agreed that the subordination of junior users would "best comport[] with the priority system of water rights administration." (Pet. App. 63a) They nonetheless justified the prior directive, on their view that Oregon, pending its stream adjudication, was declining to "protect[] senior water rights [including those asserted rights of the Tribes]," and the "March 18 letter offer[ed] no avenue or mechanism for effecting calls on junior uses." (Pet. App. 63a)

It is extremely noteworthy that despite this climate of express disagreement, neither the United States nor Oregon has yet sought a judicial resolution of the dispute concerning Reclamation's authority. Certainly neither undertook to put this hotly contested issue before either the district or the appellate court for a considered decision in this case. Consequently, the district court properly did not address the issue. The court of appeals, however, forged ahead—evidently at the invitation of the Yurok intervenors who had failed to lodge a claim for any relief—and issued what can only be characterized as an advisory opinion.

Section II.B.3. of the court's opinion, which is devoid of any analysis, explicitly endorses Reclamation's authority —indeed its "responsibility"—to subordinate the rights of petitioners to the unadjudicated water rights of Klamath Basin Tribes in its 1997 interim plan. (Pet. App. 12a) The effect of this overreaching is to deny any opportunity for interested parties to litigate this complex and important question of law

prior to its determination by a circuit in which it has great significance.[15]

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[15] There are a number arguments, some much discussed in the decisions of this Court, which petitioners or the State of Oregon could have raised had they known the court of appeals was going to decide this issue. On a factual level, of course, they could have challenged the historic and hydrological assumptions underlying Reclamation's allocation of water to the Tribes. More fundamentally, in addition to the points referenced above from the Oregon Assistant Attorney General letter of March 18, 1996, they could have asserted that Reclamation's exercise of such authority is inconsistent with the Act's basic principle that Reclamation programs must not "in any way interfere with laws of any State or Territory relating to the control, appropriation use or distribution of water used in irrigation, or any vested rights acquired thereunder," 43 U.S.C. § 383, and with the McCarran Amendment's recognition of the primacy of state law in defining and administering water rights. *See Nevada v. United States*, 463 U.S. at 122; *California v. United States*, 438 U.S. at 664-69, 678-79.

They could also have pointed out the layers of procedural conundra raised by recognizing such authority in the Bureau of Reclamation. For example, is Reclamation's action in allocating water to unadjudicated tribal rights subject to the same trial-type due process protections that apply where such rights are determined by state adjudication? *See United States v. Oregon*, 44 F.3d at 764-65. Is Reclamation's action subject to judicial review? If so, is that review properly conducted in federal court, or, in view of the McCarran Amendment and this Court's decisions, in state court? Is any decision reached in such judicial review of Reclamation's interim allocation of water binding on a subsequent state court stream adjudication, and if so how does that square with the acknowledged policy disfavoring piecemeal determination of water rights issues, *Colorado River*, 424 U.S. at 819. If such review is possible in either court, how does one reconcile the problem of potential parallel proceedings addressing the same water rights issues?

II. The Ninth Circuit Has Erroneously Characterized The Priority Of Certain Claimed Tribal Water Rights In A Case Where The Issue Was Neither Presented Nor Litigated By The Parties, Based On An Indisputable Misreading Of Its Own Prior Decision In *United States v. Adair*

Section II.B.3 of the Ninth Circuit's decision severely undermines the reliability of water rights within the Klamath Basin in a more concrete and specific way. By endorsing Reclamation's particular exercise of its newfound power in its interim plan for 1997, and by its express mischaracterization of the previously determined water rights of the "Klamath Basin Tribes," the Ninth Circuit created a federal court decision describing certain tribal rights in a wholly unsupportable manner. Such a result is hardly surprising where it is reached without aid of pleadings, evidence, briefing or argument on the subject.

Contrary to the panel's assertion, *Adair* did not determine the rights of "the Klamath Basin Tribes . . . in Oregon and California"—which tribes include the Yuroks and Hoopas of California. It only addressed the interests of the Klamath Tribe, and only within the Williamson River watershed in Oregon. (*See* Pet. App. 27a) Also contrary to the panel, there is no holding, in *Adair* or any other decision, to the effect that the Yuroks and Hoopas have any right to water, let alone a right with a priority date of time immemorial.[16] Likewise,

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[16] The panel made an important factual error in referring to "hunting and fishing rights guaranteed by treaties between Tribes in . . . California and [the] United States," (Pet. App. 12a), since the United States has no treaties with these Tribes. Whatever rights to instream flows the Yuroks and Hoopas may have—and no court has addressed that issue—they are the result not of treaties, but of executive orders granting rights to the Tribes. *See Mattz v. Arnett*, 412 U.S. 481, 485-94 (1973) (describing the history of the Yurok and Hoopa reservations in California). This fact is highly significant as a distinction from the facts of *Adair*, where the

Adair did not address the issue of the Klamath Tribe's claimed right to insist on certain water levels in Upper Klamath Lake, and thus provides no basis for the panel's endorsement of Reclamation's interim plan insofar as the plan recognizes that claimed right. *See Adair*, 723 F.2d 1394, 1398 (recognizing tribal water rights in an area not including Upper Klamath Lake). Innumerable issues of fact and law exist with respect to each of these claimed rights.

In perhaps the most objectionable sentence of the section, the court stated that Reclamation "has a responsibility to divert the water and resources needed to fulfill the Tribe's rights, rights that take precedence over any alleged rights of the Irrigators." (Pet. App. 12a-13a)[17] These words, coupled with the statement that the rights of the Klamath Basin Tribes run from "time immemorial," will almost certainly be read to state that all of the tribes of the Basin, in both states, have rights to instream flows that are senior to those of the irrigators. There is also a high risk that the Ninth Circuit's ruling on a question involving federally-based tribal water rights will be viewed as binding in the current state stream adjudication, or in

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reservation was created by treaty. A treaty "is not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." 723 F.2d at 1412-13 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The same is not true of a statute or executive order, and the decisions of this Court indicate that when an implied water right is reserved through statute or executive order creating a reservation, its priority date is that of the statute or order. *Cappaert v. United States*, 426 U.S. 128, 138-39 (1976); *Arizona v. California*, 373 U.S. 546, 595-60 (1963). This Court has never recognized a tribal water right with a priority of time immemorial.

[17] The panel's reference to "a responsibility to divert the water . . . needed to fulfill the Tribes' rights" belies another fundamental misunderstanding. (Pet. App. 12a) The claimed right to instream flows is, in essence, a right that the water *not* be diverted, but rather left in the river.

subsequent litigation involving the downstream portion of the river in California.

Such a result would be objectionable not only because of the way it was arrived at—unnecessarily, without benefit of litigation, based on a misreading of *Adair*—but also because it appears to be substantively wrong. Indeed, both the Yuroks and the United States have admitted that there is substantial room for disagreement as to the actual priority date of the asserted rights. The Yuroks themselves have characterized their rights as having a priority of "either time immemorial or . . . 1855 or 1891 at the latest." Yurok Tribe's Opposition to Plaintiff's Motion for Summary Judgment at 6; FER 119; *see also* Yurok Br. to Ninth Circuit at 43 ("aboriginal water and fishing right [was] reserved and vested no later than 1855.") According to the United States, "[t]he priority date of the Yurok and Hoopa water rights are at least as early as 1891, and may be earlier." (Pet. App. 37a) Regional Solicitor's Memorandum to the Bureau of Reclamation; U.S. SER 29. Petitioners question both the existence and scope of the claimed rights, and even the Yurok Tribe and the United States are at best equivocal in their support for the priority recognized by the Ninth Circuit.

Thus, the errors embodied in Section II.B.3 of the decision below may well have a real practical impact on the availability of water to petitioners. Irrigation water rights were initiated in the current Klamath Project service area well before the advent of the federal project. Petitioners (and the United States itself) in the currently pending Klamath adjudication, have filed claims of water rights for irrigation that are *prior* to 1891. ER 556, 564; ER 546, 548, 552, 554. If confirmed in the adjudication, these irrigation rights will be senior to any tribal right having an 1891 priority, a priority advanced by the advocates asserting the tribal right. The Ninth Circuit opinion, however, stands as a decision to the contrary, that "the Tribes' rights . . . take

precedence over any alleged rights of the Irrigators." (Pet. App. 12a-13a)

Apart from that, as pointed out by Oregon Assistant Attorney General Sanders in his March 18, 1996 letter, Reclamation's intervention in allocating water to unadjudicated tribal claims completely disrupts the orderly administration of water rights. Elsewhere in the Klamath Basin, there is a considerable amount of irrigated agriculture not associated with the Reclamation project, including lands upstream of Upper Klamath Lake as well as downstream, in the Shasta and Scott River valleys. (*See* Pet. App. 27a) The rights of many of these users are junior to petitioners, but because they do not rely for their water on federally-created facilities, they can continue to use water freely. Reclamation's intrusion into the area of water allocation thus means that petitioners are effectively pushed to the back of the line, behind not only the tribal claims but the claims of junior irrigators as well.

This case thus presents an instance of transparent judicial error in a context requiring the attention of this Court. On many occasions, this Court has stepped in to give plenary review to questions falling at the juncture of federal, state and tribal rights and powers. *E.g.*, *Rice v. Rehner*, 463 U.S. 713 (1983) (California may require federally licensed Indian trader to secure state license to sell liquor on reservation); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (Arizona taxes on logging activities on reservation held preempted); *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) (FPC could grant dam license to New York State Power Authority allowing state to condemn Indian lands for reservoir).

In this instance, petitioners submit that the Ninth Circuit's inclusion of Section II.B.3 in its opinion affirming a narrow issue of contract construction is obviously unnecessary, erroneous, and contrary to the spirit of *Colorado River*, and that the court has "so far departed from the accepted and usual

course of judicial proceedings" as to call for summary reversal, in exercise of this Court's supervisory powers. Supreme Court Rules 10(a), 16.1.[18]

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[18] The panel's addition of footnote 3, *see* p.p. 11-12, *supra*; (Pet. App. 13a), following the petition for rehearing, does nothing to ameliorate any of the problems identified here. First, in its final sentence, it repeats and emphasizes the court's intention to resolve the important and unlitigated question of the Bureau's authority to allocate water to unadjudicated tribal claims. Second, by referencing the on-going Oregon stream adjudication which will decide "questions of relative amounts and priorities, at least within Oregon," and denying any intention to determine here "the relative rights of others not before the court," the panel appears also to confirm its intention to uphold the Yurok and Hoopa Tribe water rights priorities administratively recognized by Reclamation. Because they are located in California, those Tribes have filed no claims in the pending Oregon adjudication, and the Yuroks, at least, were a party "before the court" in this case. Most importantly, as the court seems not to understand, it is in the nature of water rights that affirmance of the Bureau's allocation of water rights between only a few of the many claimants to the exact same water, without addressing "the relative rights of others not before the court," is completely disruptive of the state law prior appropriations water rights scheme that takes precedence under this court's decisions. *California v. United States*, 438 U.S. at 669.

CONCLUSION

The petition for writ of certiorari should be granted, and an order issued directing that Section II.B.3 of the decision below be vacated.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KLAMATH WATER USERS PROTECTIVE ASSOCIATION; Klamath Drainage District; Sam Henzel; Henzel Properties, Ltd., Plaintiffs-counter-defendants-Appellants,

v.

Roger PATTERSON, Regional Director, Mid-Pacific Region, U.S. Bureau of Reclamation; Karl E. Wirkus, Area Manager, Klamath Irrigation Project, U.S. Bureau of Reclamation; Eluid Martinez, Commissioner of Reclamation, U.S. Department of the Interior; Patricia Beneke, Assistant Secretary for Water and Science, U.S. Department of the Interior; Bruce Babbitt, Secretary of the Interior; The United States Bureau of Reclamation; United States of America, Defendants-Appellees,

and

PacifiCorp, Defendant-counter-claimant-Appellee,

and

Northcoast Environmental Center; Pacific Coast Federation of Fishermens Association; Institute for Fisheries Resources; Klamath Forest Alliance; Mazamas; Oregon Natural Resources Center; The Wilderness Society; Waterwatch of Oregon; Yurok Tribe, Defendant-Intervenors-Appellees.

No. 98-35708.

Filed Sept. 9, 1999
Amended Jan. 28, 2000

Before: FLETCHER, FERGUSON, and TASHIMA, Circuit Judges.

ORDER

The opinion filed September 9, 1999, is amended by adding a new footnote 3 at the end of Part II.B.3, slip op. at 11169, 191 F.3d at 1123, as follows:

3. An adjudication of all of the rights to the use of the surface waters of the Klamath River Basin ("Basin"), within the State of Oregon, is now pending in state court. *See United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994). That is a comprehensive water rights adjudication contemplated by the McCarran Amendment, 43 U.S.C. § 666, and questions of relative amounts and priorities, at least within the State of Oregon, will be decided there. Our decision in this case and that of that district court relate only to questions involving the Bureau's operation and management of the Project, and not to the relative rights of others not before the court to the use of the waters of the Basin.

With this amendment, the panel has voted to deny appellants' petition for panel rehearing. Judge Tashima votes to deny the petition for rehearing en banc and Judges B. Fletcher and Ferguson so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R.App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

OPINION

TASHIMA, Circuit Judge:

This appeal involves a basic contract issue: whether the Klamath Water Users Protective Association and other irrigators in the Klamath Basin (collectively, the "Irrigators") are third-party beneficiaries to a 1956 contract (the "Contract") between the United States Bureau of Reclamation ("Reclama-

tion" or "United States") and the California Oregon Power Company ("Copco") that governs the management of the Link River Dam (the "Dam") in the Klamath Basin (the "Project"). We hold that they are not. The district court concluded that the Irrigators do not have third-party beneficiary water rights under the Contract. It granted a declaratory judgment to Reclamation and PacifiCorp, Copco's successor in interest that now operates and maintains the Dam under the Contract, holding that PacifiCorp is not liable to the Irrigators for implementing Reclamation's water allocation decisions for the Project. *See Klamath Water Users Ass'n v. Patterson*, 15 F. Supp.2d 990, 997 (D.Or. 1998) ("*Klamath*"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. Background

The Project, located within the Upper Klamath and Lost River Basins in Oregon and California, was authorized by Congress in 1905 pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (1902). In 1905, in accordance with state water law and the Reclamation Act, the United States appropriated all available water rights in the Klamath River and Lost River and their tributaries in Oregon and began constructing a series of water diversion projects.

In 1917, the United States and Copco entered into an agreement under which Copco would construct the Dam and then convey it to the United States. In return, Copco and the United States entered into a fifty-year contract (1917-1967) that gave Copco the right to operate the Dam. The Contract was amended in 1920 and 1930, and was renewed in 1956 for an additional fifty years (1956-2006). The United States and Copco are the only named parties to the Contract. The Contract, as renewed in 1956, remains in effect and is the subject of controversy here. The Contract states that it was entered into pursuant to the Reclamation Act and "acts of Congress relating to the preservation and development of fish and wildlife resources."

The parties do not dispute that the Dam was built to help the United States satisfy its contractual obligations to water users in the basin, including the Irrigators. However, the project served other federal purposes, such as impounding water to flood the adjacent wildlife refuges. Copco's interest related primarily to controlling the flow of water to the Copco-owned hydroelectric facilities downstream from the Dam.

Operation of the Dam is also subject to the requirements of federal statutes, such as the Endangered Species Act ("ESA.") The coho salmon of the lower Klamath River has been listed as threatened, and two species of sucker fish, the Lost River and shortnose suckers, located in and around the Project, are listed as endangered. In 1992, the United States Fish and Wildlife Service issued a Biological Opinion that required certain minimum elevations for Upper Klamath Lake to avoid jeopardizing these protected species. In addition, the Secretary of the Interior has recognized that a number of Oregon tribes, including the Klamath, Yurok and Hoopa Valley tribes (the "Tribes"), hold fishing and water treaty rights in the basin.

In recognition of the federal government's various obligations related to the Project, Reclamation initiated a public process to establish a new operating plan for the Dam. For the next several years, Reclamation intends to issue one- year interim plans while formulating a long term plan for water distribution. Pursuant to this policy, in April, 1997, Reclamation circulated to interested parties a draft of its proposed 1997 interim plan for the Project. In May, 1997, Reclamation issued its final 1997 interim plan. Soon thereafter, PacifiCorp stated it would not implement the plan because the required flow levels would force it to violate its Federal Energy Regulatory Commission ("FERC") license. PacifiCorp's FERC license required FERC flows[1] in September at 1,300 cubic feet per

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[1] "FERC" flows refer to certain minimum flows for fish downstream. A FERC license regulates FERC flows.

second ("cfs"), while Reclamation's 1997 plan allowed for only 1,000 cfs.

Reclamation and PacifiCorp agreed upon a short-term modification to the Contract. The modification directed PacifiCorp to implement the 1997 plan, contingent upon FERC concurrence. The Irrigators were not included in the negotiations that led to this modification.

The Irrigators filed this action claiming, among other things, breach of the Contract based on their alleged third-party beneficiary status. In response, PacifiCorp filed a counterclaim, seeking a declaration of rights with respect to the Irrigators' standing under the Contract. The parties then filed cross-motions for summary judgment.

The district court denied the Irrigators' motion for summary judgment and granted PacifiCorp's and Reclamation's motions for summary judgment on PacifiCorp's counterclaim. *See Klamath*, 15 F. Supp.2d at 997. The Irrigators appeal.

II. Discussion

A. Third Party Beneficiaries

The Irrigators argue that under the plain language of the Contract, they are third-party beneficiaries and thus entitled to enforce the Contract's existing terms. We review the district court's grant of summary judgment de novo. *See Tri-State Dev. v. Johnston*, 160 F.3d 528, 529 (9th Cir. 1998). Because the facts are not in dispute, the only question we must decide is whether the district court correctly applied the relevant law in concluding that the Irrigators are not third-party beneficiaries under the Contract. *See id.* The interpretation of a contract is a mixed question of law and fact subject to de novo review. *See O'Neill v. United States*, 50 F.3d 677, 682 (9th Cir. 1995). In particular, the determination of whether contract language is ambiguous is a question of law. *See id.*

Federal law controls the interpretation of a contract entered pursuant to federal law when the United States is a party. *See id.* For guidance, we look to general principles for interpreting contracts. *See Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989). Before a third party can recover under a contract, it must show that the contract was made for its direct benefit—that it is an intended beneficiary of the contract. *See Williams v. Fenix & Scisson, Inc.*, 608 F.2d 1205, 1208 (9th Cir. 1979).

A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations. *See Kennewick*, 880 F.2d at 1032. Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1549 (9th Cir. 1989). Whenever possible, the plain language of the contract should be considered first. *See Textron Defense Sys. v. Widnall*, 143 F.3d 1465, 1469 (Fed. Cir. 1998); *Leicht v. Bateman Eichler, Hill Richards, Inc.*, 848 F.2d 130, 133 (9th Cir. 1988). The fact that the parties dispute a contract's meaning does not establish that the contract is ambiguous; it is only ambiguous if reasonable people could find its terms susceptible to more than one interpretation. *See Kennewick*, 880 F.2d at 1032.

When distinguishing between intended and incidental beneficiaries, the Restatement of Contracts explains:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 (1979) ("Restatement").

To sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party.[2] *See Montana v. United States*, 124 F.3d 1269, 1273 (Fed.Cir. 1997). The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended by the parties to benefit from the contract. *See id.* One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him or her. *See* Restatement § 302(1)(b) cmt. d.

Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary. *See* Restatement § 313(2). "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." *Id.* cmt. a.

The Irrigators derive their alleged intended beneficiary status from Articles 2 and 6 of the Contract. Article 2 provides, in pertinent part:

> Copco shall operate and maintain for a period of fifty (50) years from the effective date hereof . . . Link River Dam, hereby constructed by Copco and transferred to the United

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[2] A promisor owes a duty of performance to any intended beneficiary of the promise, and "the intended beneficiary may enforce the duty," Restatement § 304, whereas an incidental beneficiary acquires "no right against the promisor or the promisee." *Id.* § 315.

> States pursuant to the agreement of February 24, 1917. Copco may regulate the water level of Upper Klamath Lake between the elevations 4143.3 and 4137 . . . *Provided*, that the Contracting Officer from time to time may specify a higher minimum elevation than 4137 if in his opinion such must be maintained in order to protect the irrigation and reclamation requirements of Project Land. . . .

Article 6 provides in pertinent part:

> Nothing in this agreement shall curtail or in anywise be construed as curtailing the rights of the United States to Klamath Water or to the lands along or under the margin of Upper Klamath Lake. No Klamath Water shall be used by Copco when it may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land: *Provided*, That nothing in this agreement shall curtail or interfere with the water rights of Copco having a priority earlier than May 19, 1905. . . .

The plain language of the Contract is sufficient to rebut the contention that the Irrigators are intended third-party beneficiaries. Neither Article 2 nor Article 6 illustrates an intention of Copco or the United States to grant the Irrigators enforceable rights. The Irrigators argue that the language of Article 2 contains such an intention because it allows Copco to go below the minimum elevation level only "in order to protect the irrigation and reclamation requirements of Project Land." This sentence, however, does not manifest an intention to give third-party beneficiary rights to the Irrigators; rather, it grants discretion to the United States, through the person of the Contracting Officer, to enforce the Contract by taking control of the Dam.

The Irrigators also invoke Article 6 to prove their intended beneficiary status. They rely on the phrase stating that Copco

may not use water "when it may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land." This phrase, however, simply preserves the United States' ultimate control over the Dam and its operations. It does not confer rights on the Irrigators. *See Norse v. Henry Holt & Co.*, 991 F.2d 563, 568 (9th Cir. 1993) (holding that contract provisions preventing interference with existing rights do not turn holders of such rights into third-party beneficiaries).

Additionally, the recitation of constituencies whose interest bear on a government contract does not grant these incidental beneficiaries enforceable rights. Vague, hortatory pronouncements in the Contract, by themselves, are insufficient to support the Irrigators' claims that the United States and Copco intended to assume a direct contractual obligation to every domestic, municipal, or irrigation water user. *See Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1320 (9th Cir. 1996).

Examination of the contract as a whole illustrates that it was intended to benefit only the contracting parties. Article 15 provides:

> This contract binds and inures to the benefit of the parties hereto, their successors and assigns, including without limitation any water users' organization or similar group which may succeed either by assignment or by operation of law to the rights of the United States hereunder.

This language clearly evinces the intent of the parties to limit intended beneficiaries to the contracting parties. The language "any water user's organization or similar group" does not give the Irrigators any rights besides those of incidental beneficiaries, because they have not succeeded, either by assignment or operation of law, to the rights of the United States. Although the Contract operates to the Irrigators' benefit by impounding irrigation water, and was undoubtedly

entered into with the Irrigators in mind, to allow them intended third-party beneficiary status would open the door to all users receiving a benefit from the Project achieving similar status, a result not intended by the Contract. Accordingly, we hold that the Irrigators are not intended third-party beneficiaries.

B. Declaratory Judgment

The Irrigators also appeal the district court's grant of summary judgment for PacifiCorp on its amended counterclaim and adoption of its requested declarations. The district court held that:

> (1) plaintiffs are not third party beneficiaries to the 1956 contract with respect to irrigation water, and the contract creates no rights in plaintiffs to irrigation water; (2) the 1956 contract may be amended with regard to PacifiCorp's rights and obligations to operate Link River Dam without plaintiffs' consent; and, (3) PacifiCorp is not liable to plaintiffs under the 1956 contract for implementing Federal defendants' water allocation decisions for the Klamath Project.

Klamath, 15 F. Supp.2d at 996-97. We review de novo a decision to grant declaratory relief. *See Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996).

1. Control of the Dam

The Irrigators argue that only PacifiCorp, and not Reclamation, has the right to control the storage and release of water, and thus the district court erred in granting PacifiCorp immunity from suit for implementing Reclamation's water allocation decisions. The Contract, however, evinces the unmistakable intent that Reclamation controls the Dam. The preamble of the Contract states that the United States is "engaged in the reclamation and irrigation of lands" in the Klamath Project, and is "preparing plans for the development of water and related resources." As noted above, Article 2

dictates that while Copco "shall operate and maintain . . . Link River Dam" at certain water levels, PacifiCorp's decisions are subject to being overridden by Reclamation's "Contracting Officer." Article 6 states that "Nothing in this agreement shall curtail or in anywise be construed as curtailing the rights of the United States to Klamath Water or to the lands along or under the margin of Upper Klamath Lake." In fact, the only part of the Contract reserving any specific rights to Copco is Article 8, which provides that "[n]othing in this agreement shall be deemed to confer on the United States or upon any of its successors any right to the use of Klamath Water for the purpose of generating electric power."

In sum, the Contract makes clear that the United States retains overall authority over decisions on use of Project water. Accordingly, we hold that the district court did not err in granting PacifiCorp immunity from suit in implementing Reclamation's 1997 plan, as PacifiCorp does not control the Dam.

2. Endangered Species Act

The Irrigators claim PacifiCorp does not have a legal duty to operate the Dam to meet its ESA obligation. The district court held that the Irrigators' rights to water are subservient to the ESA. *See Klamath*, 15 F. Supp.2d at 995.

It is well settled that contractual arrangements can be altered by subsequent Congressional legislation. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982); *O'Neill*, 50 F.3d at 686. The ESA was enacted in 1973 to "halt and reverse the trend toward species extinction, whatever the cost." *See O'Neill*, 50 F.3d at 681 (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184, (1978)). Even in circumstances where the ESA was passed well after the agreement, the legislation still applies as long as the federal agency retains some measure of control over the activity. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995). Therefore, when

an agency, such as Reclamation, decides to take action, the ESA generally applies to the contract. *See Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 1754 (1999).

Because Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators. Accordingly, we hold that the district court did not err in concluding that Reclamation has the authority to direct Dam operations to comply with the ESA.

3. Indian Water Rights

The Irrigators aver that the existence of the Tribes' senior water rights are irrelevant to the current dispute, and that the district court's conclusion that the Tribes have senior water rights should be vacated. The district court found that the Irrigators' water rights were subservient to senior tribal water rights. *See Klamath*, 15 F. Supp.2d at 996.

Similar to its duties under the ESA, the United States, as a trustee for the Tribes, has a responsibility to protect their rights and resources. *See, e.g., United States v. Adair*, 723 F.2d 1394, 1408-11, 1415 (9th Cir. 1983) (holding that the Klamath Basin Tribes hold implied water rights to support hunting and fishing rights guaranteed by treaties between Tribes in Oregon and California and United States). Only Congress can abrogate Indian treaty rights, *see United States v. Dion*, 476 U.S. 734, 738 (1986), and it has not done so here.

We have held that water rights for the Klamath Basin Tribes "carry a priority date of time immemorial." *Adair*, 723 F.2d at 1414. Because Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any

alleged rights of the Irrigators. Accordingly, we hold that the district court did not err in concluding that Reclamation has the authority to direct operation of the Dam to comply with Tribal water requirements.[3]

III. Conclusion

Under the plain language of the 1956 Contract between Copco and Reclamation, the Irrigators do not possess third-party beneficiary water rights. Accordingly, the district court's grant of summary judgment to Reclamation and PacifiCorp is

AFFIRMED.

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[3] An adjudication of all of the rights to the use of the surface waters of the Klamath River Basin ("Basin"), within the State of Oregon, is now pending in state court. *See United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994). That is a comprehensive water rights adjudication contemplated by the McCarran Amendment, 43 U.S.C. § 666, and questions of relative amounts and priorities, at least within the State of Oregon, will be decided there. Our decision in this case and that of that district court relate only to questions involving the Bureau's operation and management of the Project, and not to the relative rights of others not before the court to the use of the waters of the Basin.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KLAMATH WATER USERS ASSOCIATION, et al., Plaintiffs,
v.
ROGER PATTERSON, Director, Bureau of Reclamation, PacifiCorp, et al., Defendants.

No. Civ. 97-3033-HO.

April 27, 1998.

ORDER

HOGAN, District Judge.

The central issue before the court is whether plaintiffs are third party beneficiaries to the 1956 contract between PacifiCorp (formerly Copco) and the Bureau of Reclamation (Reclamation) regarding the operation of the Link River Dam located at the outlet of Upper Klamath Lake in Southwest Oregon.

Plaintiffs filed this action on June 4, 1997, alleging four claims. This court subsequently denied plaintiff's motion for injunctive relief, granted Reclamation's motion for summary judgment on plaintiffs' National Environmental Policy Act (NEPA) claim, and, by stipulation, dismissed plaintiffs' remaining claims without prejudice.

PacifiCorp's amended counterclaim is the sole remaining substantive matter before the court. The counterclaim seeks a declaration of plaintiffs' rights under the 1956 contract [# 147].

BACKGROUND

The Klamath Project, located within the Upper Klamath and Lost River Basins in Oregon and California, was authorized by Congress in 1905 pursuant to the Reclamation Act of 1902 (32 Stat. 388). In 1905, in accordance with state water law and the Reclamation Act, the United States appropriated all available water rights in the Klamath River and Lost River and their tributaries in Oregon and began constructing a series of water diversion projects.

In 1917, the United States and Copco entered into an agreement under which Copco would construct the Link River Dam and then convey the dam to the United States. In return, Copco and the United States entered into a fifty-year contract (1917-1967) which gave Copco the right to operate the dam. The contract was amended in 1920 and 1930, and was renewed in 1956 for an additional fifty years (1956-2006). The 1956 renewal of the Link River Dam contract remains in effect and is the subject of dispute here.

The 1956 contract states it was entered into pursuant to the Reclamation Act and "acts of Congress relating to the preservation and development of fish and wildlife resources." Federal Defendants' Memorandum in Support of Motion for Summary Judgment on Defendant PacifiCorp's Counterclaim [# 163], Exhibit 1, p. 1.

Article 6 of the 1956 contract, highlighted by plaintiffs, states:

> No Klamath Water shall be used by Copco when it may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land. . . .

Id. at p. 5.

Article 15 of the 1956 contract, relied upon by defendants, states the contract:

> binds and inures to the benefit of the parties hereto, their successors and assigns, including without limitation any water users' organization or similar group which may succeed either by assignment or by operation of law to the rights of the United States hereunder.

Id. at 8. The United States and Copco are the only named parties to the 1956 contract. The United States has not assigned any of its rights under the 1956 contract to any water users' organization, nor has any such organization succeeded to those rights.

The 1956 contract also states:

> Copco may regulate the water level of Upper Klamath Lake between the elevations 4143.3 and 4137, . . . except at such times, and on such conditions, as may be satisfactory to the Contracting Officer [the United States]: Provided, That the Contracting Officer from time to time may specify a higher minimum elevation than 4137 if in his opinion such must be maintained in order to protect the irrigation and reclamations requirements of Project Land.

Id. at p. 3.

Since completion of the Klamath project, Reclamation and water users in the basin have entered into over 250 water delivery contracts, also called repayment contracts. The vast majority of these repayment contracts provide:

> On account of drought, canal breaks, inaccuracy in distribution, or other causes, there may occur at times a shortage in the water supply provided for herein for lands of the District and, while the United States will use all reasonable means to guard against such shortages, in no event shall any liability accrue against the United States . . . for any damages, direct or indirect, arising therefrom. . . .

Declaration of Karl Wirkus [# 163] Ex. B, pp. 12-13.

It is not disputed that Reclamation arranged for Link River Dam to be built in significant part to help it satisfy its contractual obligations to water users in the basin, such as plaintiffs. However, the project served other federal purposes, such as impounding water to flood the adjacent wildlife refuges. Copco's interest related primarily to controlling the flow of water to the Copco-owned hydroelectric facilities downstream from Link River Dam. In 1961, the Federal Energy Regulatory Commission required Copco to release water from Link River Dam to provide certain minimum flows for fish downstream (called "FERC" flows).

Operation of Link River Dam is also subject to the requirements of federal statutes, such as the Endangered Species Act. The coho salmon of the lower Klamath River has been listed as threatened and two species of sucker fish, the Lost River and shortnose suckers, located in and around the Klamath Project, are listed as endangered. In 1992, the United States Fish and Wildlife Service issued a Biological Opinion that required certain minimum elevations for Upper Klamath Lake to avoid jeopardy to protected species.

In addition, the Secretary of Interior has recognized that a number of tribes, including the Klamath, Yurok and Hoopa Valley tribes, hold fishing and water treaty rights in the basin. These rights appear to have a priority date of either "time immemorial" or the date of the respective treaties, making them senior to any water rights obtained by the United States or irrigators in the Klamath Project. *See, e.g., United States v. Adair*, 723 F.2d 1394, 1412 (9th Cir. 1984).

In recognition of the federal government's various obligations related to the Klamath Project, Reclamation initiated a public process to establish a new operating plan for the Klamath Project. According to representations made to the court during oral argument in this matter, for the next several

years, Reclamation intends to issue one-year interim plans while formulating a long term plan.

Pursuant to this policy, on April 25, 1997, Reclamation circulated to interested parties, a draft of its proposed 1997 interim plan for the Klamath Project. On May 1, 1997, Reclamation issued its final 1997 interim plan. Soon after, PacifiCorp stated it would not implement the plan because the required flow levels would force it to violate its FERC license. PacifiCorp's FERC license required FERC flows in September at 1,300 cubic feet per second (cfs), while Reclamation's 1997 plan allowed for only 1,000 cfs.

Irrigation groups were aware that PacifiCorp and Reclamation were attempting to negotiate a resolution of this impasse. On June 2, 1997, at the irrigators' request, PacifiCorp attorneys met with members of the irrigation community to discuss implementation of the 1997 plan and the 1956 contract. Large portions of the meeting were tape recorded by members of the irrigation community and later transcribed.

On June 3, 1997, Reclamation and PacifiCorp agreed upon a short-term modification to the 1956 contract. The modification directed PacifiCorp to implement the 1997 plan, contingent upon FERC concurrence. Plaintiffs were not included in the negotiations that led to this modification.

On June 4, 1997, plaintiffs filed this action seeking a temporary restraining order and alleging four claims, including a claim for breach of the 1956 contract based on their third party beneficiary status.

On June 17, 1997, this court denied plaintiff's motion for a temporary restraining order [# 40]. PacifiCorp filed a counter-claim on July 7, 1997, seeking a declaration of rights with respect to plaintiffs' standing under the 1956 contract [# 60]. On July 29, 1997, following briefing and oral argument, the

court granted Reclamation's motion for summary judgment on plaintiffs' NEPA claim [# 132].

On September 25, 1997, plaintiffs moved for voluntary dismissal without prejudice of their remaining three claims [# 137, 139]. Pursuant to stipulation of the parties, the court granted dismissal of plaintiffs' claims without prejudice on the condition that Reclamation be joined as a necessary party to PacifiCorp's counterclaim [è 146, 148]. PacifiCorp filed an amended counterclaim [# 147] on October 29, 1997.

Now before the court are the parties' cross motions for summary judgment and to dismiss defendant PacifiCorp's First Amended Counterclaim [è 151, 154, 161, 164]. Also before the court is defendant PacifiCorp's motion to strike reference to the tape recorded transcript of the pre-litigation meeting between irrigators and PacifiCorp attorneys [# 200].

DISCUSSION

1. Standard:

Summary judgment is appropriate if the court finds there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). There is no genuine issue of material fact where the nonmoving party fails "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

All reasonable doubts as to the existence of genuine issues of fact must be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). The inferences drawn from underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences can be drawn, summary judgment

is not appropriate. *Sankovich v. Life Ins. Co. of North America*, 638 F.2d 136, 140 (9th Cir. 1981).

A motion to dismiss under Fed.R.Civ.P. 12(b)(6) will only be granted when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997), citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). It is improper to inquire into the adequacy of the evidence when deciding whether to dismiss for failure to state a claim. *Yamaguchi v. United States Dept. of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997), citing *Campanelli v. Bockrath*, 100 F.3d 1476, 1484 (9th Cir. 1996). Instead, "the court must accept as true the plaintiff's allegations contained in the complaint and view them in the light most favorable to [plaintiff]." *Id.* citing *Scheuer v. Rhodes*, 416 U.S. 232, 235 (1974).

2. Declaratory Relief:

Declaratory relief is appropriate if a judgement will clarify and settle the legal relationships in question and if it will relieve uncertainty giving rise to the controversy. *Natural Resources Defense Council v. EPA*, 966 F.2d 1292, 1299 (9th Cir. 1992). Defendant PacifiCorp asserts declaratory judgment is appropriate here to resolve the uncertainty surrounding current negotiations between it and Reclamation regarding the 1956 Link River Dam contract. Plaintiffs initiated this litigation and have predicted future litigation pertaining to their rights under the 1956 contract. The court finds that this counterclaim involves an actual controversy and so declaratory judgement is appropriate under 28 U.S.C. § 2201.

3. Third Party Beneficiary Rights:

Plaintiffs allege they are third party beneficiaries to the 1956 contract because Link River Dam is operated for their benefit. They contend the parties to the 1956 contract were required to

obtain the irrigators' approval prior to any modifications to that contract.

For a party to sue as a third party beneficiary, the third party must show the contract was specifically intended to be for that party's direct benefit. *German Alliance Ins. v. Home Water Supply*, 226 U.S. 220, 230 (1912). *PacifiCorp* relies on *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 219 (7th Cir. 1996), which states:

> "Contracts often benefit persons besides the signatories, and breach harms them. To allow all these injured parties to sue would expose contract promisors to enormous potential liabilities . . . and would be inconsistent with the limitations that tort law imposes on remote liability."

The intention to specifically benefit a third party may be express or implied. Generally, beneficiaries of a government contract are assumed to be incidental beneficiaries and may not enforce the contract unless there is a "clear intent" to the contrary. *Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 288 (D.D.C. 1993). The court may look beyond the contract to make such a determination. *Sepulveda v. Pacific Maritime Ass'n*, 878 F.2d 1137, 1139 (9th Cir. 1989). Such a showing entails an "onerous burden of proof" because of the long-standing rule that "[a]n individual who is not a party to a contract . . . does not have a right to sue for breach of that contract merely because he would benefit from its performance." *Maniere v. United States*, 31 Fed. Cl. 410, 417 (1994); *Berberich v. United States*, 5 Cl. Ct. 652, 655 (1984).

As evidence of their third party beneficiary status, plaintiffs note the introductory recital language of the 1956 contract, which states its renewal is in the best interests of users of the water in the Klamath River Basin. Declaration of Paul Simmons, Ex. I, p. 3. Plaintiffs also point to other factors they argue indicate an intent to directly benefit irrigators, such as the contractual prohibition on releasing water that may be needed

for irrigation, as well as statements in the reclamation statutes that such projects are primarily for the benefit of irrigation.

In particular, plaintiffs place heavy reliance on Article 6 of the 1956 contract, which prohibits PacifiCorp from using water when it may be "needed or required by the United States or any [entity] obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land." Plaintiffs argue this language clearly evinces an intent to directly and specifically benefit irrigators.

Defendants argue Article 6, read in full, is simply an exchange of assurances between Copco and Reclamation that nothing in the contract would alter the preexisting claims or water rights possessed by the parties to the contract. Defendants also note that this provision, by its terms, protects only persons taking water "from the United States." They assert this provision allows the United States to meet its obligations to such entities, but it does not expand the underlying rights held by those parties. While Article 6 makes it clear that Copco obtained a right to use water for power generation when such water was not needed by the United States or irrigators, nothing in Article 6 created or expanded any rights irrigators may have possessed to water in the basin. Those rights are created and governed by state water law and the irrigators' individual contracts with Reclamation. Therefore, defendants argue, Article 6 conferred no benefit to non-parties sufficient to create third party beneficiary rights.

PacifiCorp argues the contract here, particularly Article 6, created no new rights for the irrigators, but merely put irrigators on notice the government was not granting PacifiCorp any right to interfere with preexisting legal rights possessed by the irrigators. Therefore, PacifiCorp argues, any benefit to plaintiffs was incidental.

Defendants also argue plaintiffs' rights to water derive from their individual repayment contracts with Reclamation. The

1956 contract states the only benefits of the contract are to the parties themselves or their successors or assigns. Defendants assert plaintiffs are attempting to turn the 1956 contract into an entitlement to water in order to sidestep the limitations on water deliveries contained in their individual repayment contracts with Reclamation.

PacifiCorp cites *Norse v. Henry Holt and Co.*, 991 F.2d 563 (9th Cir. 1993). *Norse* involved copyrighted letters of Harold Norse, which he made available at the public library. Any person copying at the library had to sign an agreement making clear the library could not give legal authority to publish materials. An author copied Norse's letters and included them in a book published by Holt. Norse sued, arguing he was a third party beneficiary of the library's contract. The Ninth Circuit rejected this claim because the agreement simply put the user on notice that the library did not grant any right to publish materials, and thus the benefit to Norse was purely incidental. *Id.* at 568.

Reclamation must deliver water to project irrigators in accordance with the rights held by the United States in the project and the irrigators' individual repayment contracts, subject to the availability of water. Under those contracts, water shortages caused by "drought, canal breaks, inaccuracy in distribution, or *other causes* will not result in any liability 'against the United States . . . for any damages, direct or indirect, arising therefrom. . . .' " Declaration of Karl Wirkus [# 163] Ex. B, p. 12-13 (emphasis added). Reclamation argues a water shortage could result from a drought, from Reclamation's obligation to satisfy senior tribal rights, or Reclamation's obligation to comply with other federal laws, such as the Endangered Species Act. *O'Neill v. United States*, 50 F.3d 677, 680-81 (9th Cir. 1995) ("other causes" language in reclamation contract construed to covered Endangered Species Act listing). Defendants argue the repayment contracts

would preclude plaintiffs from suing the federal government if the above things were to occur.

These separate repayment contracts, while outside the issue of whether plaintiffs are third party beneficiaries to the 1956 contract, provide important context to the intentions of the parties to the 1956 contract. The court is allowed to look beyond the 1956 contract to make a determination regarding third party beneficiary status and finds these coexistent repayment contracts to be relevant evidence in making this determination. *Sepulveda v. Pacific Maritime Ass'n*, 878 F.2d 1137, 1139 (9th Cir. 1989).

Viewing the entire record before the court, in the light most favorable to plaintiffs, I find plaintiffs have failed to demonstrate the existence of a material fact indicating they are intended third party beneficiaries to the 1956 contract. The 1956 contract operates to plaintiffs' benefit by impounding irrigation water, and certainly was entered into with irrigators in mind. However, plaintiffs are not parties to the contract and there is no manifestation of intent by the parties to provide to the many irrigators participating in the project the right to sue under the contract or veto proposed modifications to it. The provision in the 1956 contract that establishes minimum and maximum lake levels appears to benefit irrigators, but the level is subject to fluctuation and is accompanied by significant discretion in the government and PacifiCorp to go outside the range. Moreover, while PacifiCorp and Reclamation benefit directly from the above provision, plaintiffs benefit only indirectly through Reclamation's enhanced ability to satisfy its underlying but separate obligations to deliver water to plaintiffs and others. Such an indirect benefit is incidental and, therefore, insufficient to confer third party beneficiary status on plaintiffs.

The 1956 contract is not the source of plaintiffs' rights to water in the Klamath Basin. Rather, their water rights are found primarily in their individual repayment contracts with the federal government and in state water law. The irrigators'

contracts with the government contain a clause holding the government harmless in the event of a shortage. Declaration of MacFarlane, Ex. M (a 1954 water user contract). To allow plaintiffs to sue for a shortage under the 1956 contract, to which they are not parties, in the face of the hold harmless provision contained in their individual repayment contracts, to which they are parties, would be inconsistent and is not supported by the record.

The language of the 1956 contract does not identify plaintiffs as intended beneficiaries of the contract. A review of the record as a whole, particularly the language of the contract itself, confirms this view. Article 15 limits intended beneficiaries to the parties to the contract. Under the arguments advanced by plaintiffs, most users of the Klamath Project water would stand as intended third party beneficiaries to the 1956 contract, a result not supported by the record. Moreover, the 1956 contract did not give plaintiffs water rights superior to those in plaintiffs' individual repayment contracts with Reclamation, although acceptance of plaintiffs' arguments would necessitate such a conclusion. Finally, plaintiffs' rights to water in the basin, whether as third party beneficiaries to the 1956 contract or under their individual repayment contracts with Reclamation, are subservient to senior tribal water rights and to subsequent legislative enactments by Congress, such as the Endangered Species Act. O'Neill, 50 F.3d at 680-81.

4. Conclusion:

The court finds the amended counterclaim constitutes an actual controversy and is therefore appropriate for declaratory judgment under 28 U.S.C. § 2201(a) due to the uncertainty surrounding current negotiations pertaining to the 1956 contract.

In paragraph 17 of its amended counterclaim, PacifiCorp seeks a declaratory judgement that: (1) plaintiffs are not third party beneficiaries to the 1956 contract with respect to

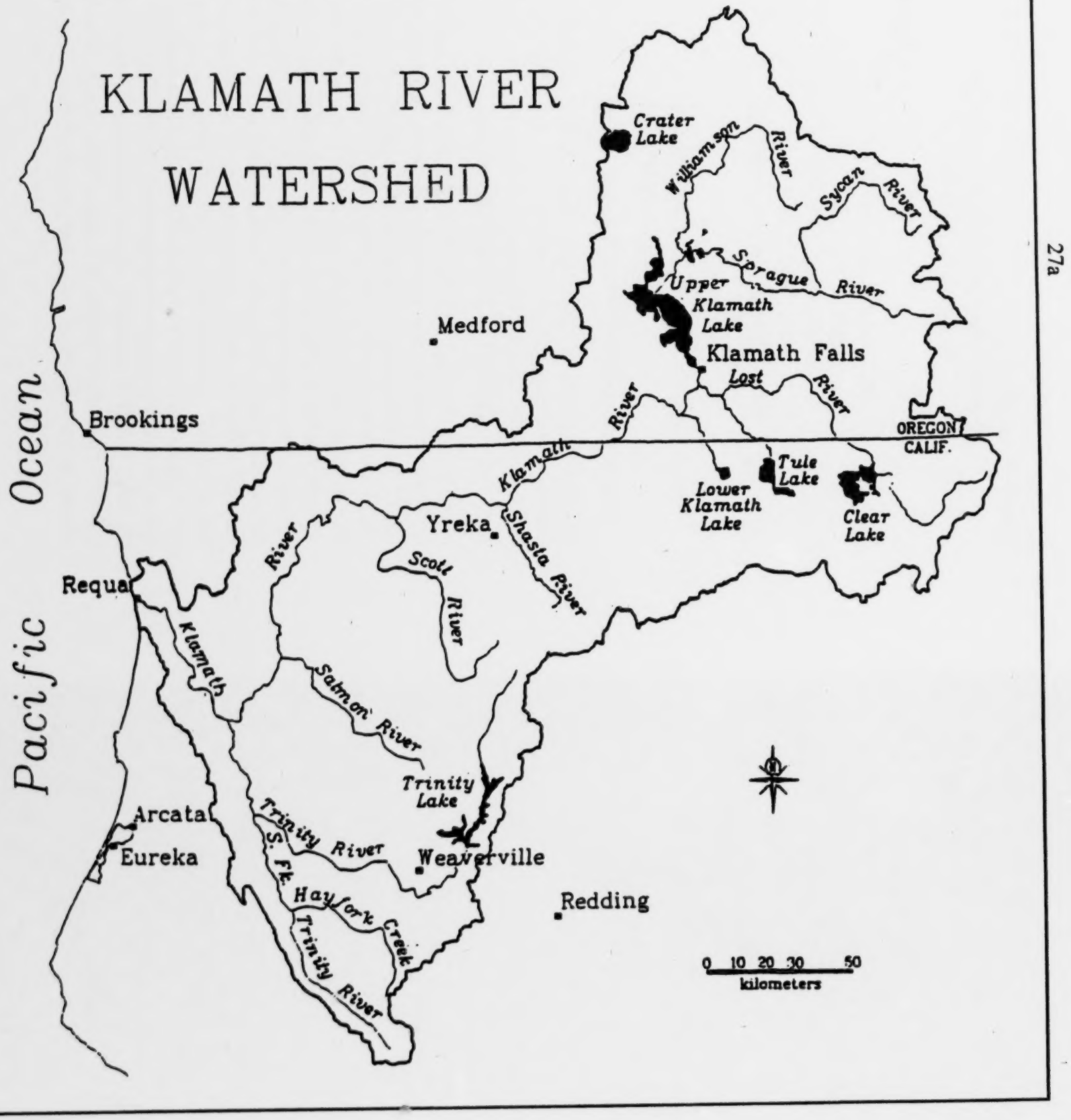
irrigation water, and the contract creates no rights in plaintiffs to irrigation water; (2) the 1956 contract may be amended with regard to PacifiCorp's rights and obligations to operate Link River Dam without plaintiffs' consent; and, (3) PacifiCorp is not liable to plaintiffs under the 1956 contract for implementing Federal defendants' water allocation decisions for the Klamath Project. [# 147], p. 4.

For the reasons set forth above, defendant PacifiCorp's motion for summary judgment on its amended counterclaim [# 164] is granted and its requested declarations are hereby adopted; defendant Reclamation's motion for summary judgment on defendant PacifiCorp's amended counterclaim [# 161] is granted; plaintiffs' motion to dismiss defendant PacifiCorp's amended counterclaim [# 151] is denied; and, plaintiffs' motion for summary judgment on defendant PacifiCorp's amended counterclaim [# 154] is denied.

Finally, defendant PacifiCorp's motion to strike [# 200] is denied. The record before the court does not support defendant's contention that these discussions amounted to "compromise negotiations" under Federal Rule of Evidence 408.

IT IS SO ORDERED.

KLAMATH RIVER WATERSHED



[Dated July 25, 1995]

UNITED STATES DEPARTMENT OF THE INTERIOR

[SEAL]

OFFICE OF THE SOLICITOR
Pacific Southwest Region
2800 Cottage Way
Room E-2753
Sacramento, California 95825-1890

TO: Regional Director, Bureau of Reclamation, Mid-Pacific Region

FROM: Regional Solicitor, Pacific Southwest Region

SUBJECT: Certain Legal Rights and Obligations Related to the U.S. Bureau of Reclamation, Klamath Project for Use in Preparation of the Klamath Project Operations Plan (KPOP)

This memorandum describes the general rights to the waters in the Klamath and Lost River drainages affected by the operation of the U.S. Bureau of Reclamation's (Reclamation) Klamath Irrigation Project located within the Upper Klamath and Lost River Basins in Oregon and California. In addition, the obligations of Reclamation to the holders of these rights are discussed. The rights that are treated in this memorandum include those of the Klamath Project water users (those who hold contracts with the United States to receive water from the project), the Upper Klamath, Lower Klamath, Tule Lake, and Clear Lake National Wildlife Refuges (NWR) managed by the U.S. Fish and Wildlife Service (these refuges are located within the exterior boundaries of the Klamath Project), and the Klamath, Yurok, and Hoopa Tribes (they have treaty-based or federally reserved fishing and water rights that are or may be

affected by project operations). None of the above water rights has been quantified.[1]

Rights

Klamath Project Water Users

The Klamath Project water users obtain their supply of water for irrigation purposes from the project facilities pursuant to various contracts with Reclamation entered into pursuant to the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 371 *et seq.*, as amended and supplemented. The contracts are between Reclamation and a water district or Reclamation and an individual water user. These contracts provide, in general, that the water user is to receive enough water to satisfy the beneficial use for the irrigation of a specified acreage. Certain of the contracts specify the beneficial use amount on a per acre basis.

The underlying water rights for the project, upon which the water supply stated in each of the contracts discussed above depends, were obtained by Reclamation, in accordance with state law, in 1905, when Reclamation filed a notice of intent to appropriate all of the available water in the Klamath River and Lost River and their tributaries in Oregon. Similar filings were made for the waters originating in California, within the Lost River and Clear Lake drainages.[2] Subsequent to these filings,

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[1] The existence and nature of the Klamath Tribes' reserved water rights for hunting, fishing, and gathering were declared in *United States v. Adair*, 723 F.2d 1394, 1412 (9th Cir.), *cert. denied*, 467 U.S. 1252 (1984).

[2] Oregon statutes concerning the appropriation of water before February 24, 1909, the effective date of the Oregon Water Rights Act of 1909, provided that the extent of the appropriation was determined by the actual capacity of the completed diversion structure, assuming that the requirement to post a notice of intent to appropriate together with application of water to beneficial use within a reasonable time had occurred. *See In re Waters of the Tualatin River and its Tributaries*, 366 P.2d 174 (Or. 1961). The laws for appropriation of water in California

Reclamation constructed project facilities through which water is delivered to the project water users. The project's 1905 water rights are junior to the reserved water rights of the tribes but senior to the reserved water rights of the refuges, as discussed below.

Federal law provides that Reclamation obtain water rights for its projects and administer its projects pursuant to state law relating to the control, appropriation, use or distribution of water used in irrigation, unless the state laws are inconsistent with express or clearly implied congressional directives. 43 U.S.C. § 383; *California v. United States*, 438 U.S. 645, 678 (1978); *appeal on remand*, 694 F.2d 117 (1982). The beneficial ownership of a project water right is in the water users who put the water to beneficial use. *Nevada v. United States*, 463 U.S. 110 (1983). Under law of most western states a water right is obtained through appropriation followed by application within a reasonable time to beneficial use. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Ickes v. Fox*, 300 U.S. 82 (1937). Oregon law (as well as California law) is similar to the laws of most other western states in that actual application of the water to the land is required to perfect a water right for agricultural use.[3]

Oregon also recognizes that water for irrigation purposes is appurtenant to the land for which it is appropriated and applied, but is not inseparable from the land. In re *Deschutes River and*

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that were in effect in 1905 were similar to those in Oregon. Cal. Civil Code of 1872, §§ 1410-22 (Deering 1977). The effective date of the California Water Commission Act, which established California's current appropriation scheme, is December 19, 1914.

[3] *See* ORS §§ 539.010 *et seq.*; *State ex rel. v. Hibbard*, 570 P.2d 1190, 1194 (Or. Ct. App. 1977); *Alexander v. Central Oregon Irrigation District*, 528 P.2d 582 (Or. Ct. App. 1974), and Cal. Water Code § 1240; *Joerger v. Pacific Gas & Elec. Co.*, 276 P. 1017 (Cal. 1929); *Madera Irr. Dist. v. All Persons*, 306 P.2d 886 (Cal. 1957).

Tributaries, 286 P. 563 (Or. 1930) ; see also *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 858 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983). Federal law concerning Reclamation projects also provides that the use of water acquired under the Act "shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and the limit of the right." 43 U.S.C. § 372. Beneficial use is determined in accordance with state law to the extent not inconsistent with congressional directives. *See Alpine Land & Reservoir Co.*, 697 F.2d at 853-854; see also *California v. United States*, 438 U.S. at 678.

Wildlife Refuges

There are two National Wildlife Refuges that are particularly dependent on project operations: Lower Klamath and Tule Lake NWRs.[4] The Lower Klamath NWR consists of 51,713 acres which straddle the Oregon-California border. This NWR was created by Executive Order No. 924 (Aug. 8, 1908) "as a preserve and breeding ground for native birds." The boundaries of the Lower Klamath NWR were altered by Executive Order No. 2200 (May 14, 1915). The Tule Lake NWR is a 39,990 acre marsh area located in northern California just south of the Oregon border. Tule Lake was created by Executive Order No. 4975 (Oct. 4, 1928) also "as a refuge and breeding ground for birds."[5]

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[4] There are two other National Wildlife Refuges within the exterior boundaries of the project that are also dependent on project operations. The Upper Klamath NWR was created in 1928 and is located at the northern portion of Upper Klamath Lake. It encompasses 14,965 acres of marsh and open water. The Clear Lake NWR was created in 1911 and encompasses 20,000 acres of water surface and upland area within the Clear Lake drainage in the Lost River Basin.

[5] The interrelation of the Klamath Project irrigation uses and the NWR purposes are further delineated in the Kuchel Act, 16 U.S.C. §§ 695k-695r.

Each refuge has a federal reserved water right to the amount of water, unappropriated at the time of creation of the refuge, necessary to fulfill the primary purposes of the refuge. *See United States v. New Mexico*, 438 U.S. 696 (1978). The priority date for the reserved water right of each refuge is the date of the executive order creating that refuge. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976). In addition, certain lands within the Lower Klamath and Tule Lake refuges that are irrigated have a priority date of 1905 based on the Klamath Project water rights. Finally, the refuges receive significant quantities of return flows and other project waters which, although initially used for irrigation purposes, are beneficially reused for refuge purposes.

Klamath-Indian Tribes

The Klamath Indian Tribes have treaty-based rights. The exercise of certain of these rights are affected by project operations. The Tribes' primary interest is in the operation of Upper Klamath Lake because it serves as habitat for fish protected by their treaty rights, including two endangered species of fish, the Lost River and shortnose suckers. These fish are a traditional food source for the Tribes. Changing water elevation in the lake and recurring water quality problems impact the suckers.

A treaty entered into in 1864 reserves to the Klamath Tribes fishing, hunting, and gathering rights on lands that were formerly part of the original Klamath Indian Reservation in Oregon.[6] The reservation abutted Upper Klamath Lake and

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[6] In 1954, the Klamath Indian Reservation in Oregon was terminated pursuant to the Klamath Termination Act. Act of Aug. 13, 1954, c. 732, § 1, 68 Stat. 718 (codified at 25 U.S.C. §§ 564-564x). Under this Act, reservation lands were disposed to private parties, individual Indians, the Forest Service and the Fish and Wildlife Service, but the Tribes' hunting, fishing, and gathering rights, and supporting water rights, were left intact. *United States v. Adair*, 723 F.2d 1394, 1412 (9th Cir.), *cert. denied*, 467

included several of its tributaries, notably the Williamson River. Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 107. The treaty reserves to the Tribes a federal Indian reserved water right to support their hunting, fishing, and gathering rights.[7] *United States v. Adair*, 723 F.2d 1394 (9th Cir.), *cert. denied*, 444 U.S. 1252 (1984). The Tribes' water right includes "the right to prevent other appropriators from depleting the streams['] waters below a protected level in any area where the non-consumptive right applies." *Adair*, 723 F.2d at 1411; *accord Joint-Board of Control v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988); *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985).

The Tribes' water right includes the right to certain conditions of water quality and flow to support all life stages of fish. *See United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982), *aff'd in part & rev'd in part on other grounds*, 736 F.2d 1358 (9th Cir. 1984); *see also United States v. Gila Valley Irrigation Dist.*, 804 F. Supp. 1, 7 (D. Ariz. 1992), *aff'd in part & vacated in part*, 31 F.3d 1428 (9th Cir. 1994), *on remand Globe Equity No. 59*, Phase IV, slip op. (April 14, 1995). The Tribes, water right attaches to bodies of water

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U.S. 1252 (1984); *Kimball v. Callahan*, 590 F.2d 768, 775 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979); *Kimball v. Callahan*, 493 F.2d 564, 568-69 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974). The Klamath Tribes were later restored as a federally recognized tribe under the Klamath Restoration Act of 1986. Pub. L. No. 99-398, 100 Stat. 849.

[7] The Tribes' water right is not dependent on state law, but rather is controlled by federal law. However, in an adjudication of water rights pursuant to the McCarran Amendment, 43 U.S.C. § 666, this federal right would be subject to quantification by a state court. *Adair*, 723 F.2d at 1411 n.19.

located within the original boundaries of the Klamath Indian Reservation. The Tribes' fishing right also supports a water right in off-reservation areas to the extent necessary to support a tribal fishery within the original reservation.[8] *Cf. Arizona v. California*, 373 U.S. 546, 595 n.97, 600, *decree entered*, 376 U.S. 340, 344 (1964) (awarding reserved water right in off-reservation river). The standard to be applied in determining the quantity of water secured by this right has not been determined as of the date of this memorandum. The Tribes' water right is aboriginal in origin and thus has a priority date of time immemorial. *Adair*, 723 F.2d at 1415.

Yurok and Hoopa Valley Indian Tribes

The Yurok and Hoopa Valley Tribes have federal Indian reserved fishing rights to take anadromous fish within their reservations in California. Memorandum from the Solicitor to the Secretary, Fishing Rights of the Yurok and Hoopa Valley Tribes, M-36979 (Oct. 4, 1993) (Sol. Op.). These rights were secured to the Yurok and Hoopa Indians by a series of nineteenth century executive orders and confirmed to the Yurok and Hoopa Tribes by the 1988 Hoopa-Yurok Settlement Act (HYSA) , 25 U.S.C. § 1300i *et seq.*[9]

In 1855, the President, by Executive Proclamation, established the Klamath Reservation in California.[10] I C. Kappler, *Indian*

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[8] In the pending Snake River Basin Adjudication in Idaho, the United States has made claims for off-reservation instream flow water rights derived from Indian fishing rights to anadromous fish. The quantity of flow claimed is that amount required to provide adequate flows to maintain fisheries habitat in the stream reach on a monthly basis.

[9] For the purpose of determining the existence of reserved water rights, there is no consequence to the fact that the Tribes' rights are derived from executive orders rather than treaties. *Arizona v. California*, 373 U.S. at 598.

[10] The executive order establishing the Klamath Indian Reservation was issued pursuant to the Act of March 3, 1853, 10 Stat. 238, authorizing the

Affairs: Laws and Treaties 816-817 (1904). The Hoopa Valley Reservation was formally set aside for Indian purposes by executive order in 1876, and the reservation was extended by another executive order in 1891 to encompass the Klamath Reservation and the connecting strip of land in between.[11] *Id.* at 815; *see People v. McCovey*, 685 P.2d 687, 689 (Cal. 1984); *see also Donnelly v. United States*, 228 U.S. 243, 253-259 (1912); *Blake v. Arnett*, 663 F. 2d 906, 911 (9th Cir. 1981); *Esler v. Gill Net Number One*, 54 Cal. Rptr. 568, 571-72 (1966). The HYSA partitioned the extended reservation into the present Hoopa Valley and Yurok Reservations and declared the assets of each reservation held in trust by the United States for the benefit of the respective Tribes. 25 U.S.C. § 1300i-l(b).

The Yurok and Hoopa Valley Tribes' fishing rights entitle them to take fish for ceremonial, subsistence, and commercial purposes. *United States v. Eberhardt*, 789 F.2d 1353, 1359 (9th Cir. 1986). Their fishing rights "include the right to harvest quantities of fish on their reservations sufficient to support a moderate standard of living." Sol. Op. at 3.

The executive orders setting aside what are now the Yurok and Hoopa Valley Reservations also reserved rights to an instream flow of water sufficient to protect the Tribes' rights to take fish within their reservations. *See Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Anderson*, 591 F. Supp. at 5-6. As with the Klamath Tribes, the Yurok and Hoopa Tribes' water rights include the right to prevent other appropriators from depleting the streams' waters below a protected level. *See Joint Board of Control*, 832 F.2d at 1131-32; *Adair*, 723 F.2d at 1411; *see also Kittitas*

President "to make . . . reservations in the State of California for Indian purposes."

[11] These executive orders were issued pursuant to the Act of April 8, 1864, 13 Stat. 39.

Reclamation District, 763 F.2d at 1033. The Tribes' rights include the right to certain conditions of water quality and flow to support all life stages of fish. *See Anderson*, 591 F. Supp. at 5-6; *see also Gila Valley Irrigation District*, 804 F. Supp. at 7. The Tribes' fishing right also supports a water right in off-reservation areas to the extent necessary to support the Tribes' on-reservation fisheries. *Cf. Arizona v. California*, 373 U.S. at 595 n.97, 600 (awarding reserved water right in off-reservation river). The exact standard to determine the amount of water secured by these rights has not been determined as of the date of this memorandum. The priority date of the Yurok and Hoopa water rights are at least as early as 1891, and may be earlier.

Obligations

Klamath Project Water Users

Reclamation has an obligation to deliver water to the project water users in accordance with the project water rights and the contracts between Reclamation and the water user (which may be through a water district) subject to the availability of water. Reclamation must protect the rights of the users of project water, *see* Filing of Claims for Water Rights in General Stream Adjudications, M-36966, 97 I.D. 21 (July 6, 1989), and cannot "ignore . . . the obligations that necessarily devolve upon it from having mere title to water rights for the [project], when the beneficial ownership of these water rights resides elsewhere." *Nevada v. United States*, 463 U.S. at 127. Water would not be available, for example, due to drought, a need to forego diversions to satisfy prior existing rights, or compliance with other federal laws such as the Endangered Species Act. Water lawfully stored in the project's reservoirs can be used for domestic and irrigation purposes to the extent the water is applied to beneficial use within the project. Reclamation cannot store or divert water for project purposes that is needed to satisfy prior existing rights.

Refuges

Reclamation has an obligation to ensure that the refuges receive adequate water to fulfill their federal reserved water rights (*i.e.*, the amount of water necessary to fulfill the primary purposes of the refuges) when in priority and when water is available. In addition, Reclamation can continue to provide available project water for beneficial reuse by the refuges to the extent of past and current usage and consistent with project purposes.

The Kuchel Act (see footnote 5) requires that the refuge lands be used primarily for waterfowl purposes but with full consideration given to optimum agricultural use so far as agricultural use is consistent with the refuge purposes. 16 U.S.C. § 6951. In addition, the pattern of agricultural leasing existing in 1964 is to be continued on specified lands within the refuges as consistent with proper waterfowl management. *Id.* § 695n. Thus, it is possible that certain irrigated lands within the refuge boundaries would not be cultivated in the usual manner if that would be inconsistent with the purposes of the refuges. If such change in cultivation resulted in less water being used for irrigation within the project, then more water may be available for the refuges, pursuant to a change in the water right or otherwise, subject to prior existing rights and water availability.

The Tribes

The United States has a trust responsibility to protect tribal trust resources. This trust responsibility is one held by all federal agencies. *Pyramid Lake Paiute Tribe v. Department of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). In general, the trust responsibility requires the United States to protect tribal fishing and water rights, which are held in trust for the benefit of the tribes. *See Mitchell v. United States*, 463 U.S. 206, 224-226 (1982); *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 425-426 (1991); *Joint Board of Control of the*

Flathead, Mission and Jocko Irr. Dist. v. United States, 862 F.2d 195 (1988).

Reclamation is obligated to ensure that project operations not interfere with the Tribes' senior water rights. This is dictated by the doctrine of prior appropriation as well as Reclamation's trust responsibility to protect tribal trust resources.

With respect to the Tribes, fishing rights, Reclamation must, pursuant to its trust responsibility and consistent with its other legal obligations, prevent activities under its control that would adversely affect those rights, even though those activities take place off-reservation. *See Parravano v. Babbitt*, 861 F. Supp.914, 924 (N.D. Cal. 1994), *appeal pending*. Thus, Reclamation must use any operational discretion it may have to ensure that those rights are not diminished. In doing so, Reclamation, in formulating any operating plan, must minimize unnecessary waste and take such other steps within its legal and contractual authority as are necessary to protect tribal rights. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 255-256 (1973). In relation to a different Reclamation project, a court directed Reclamation, in formulating an operating plan, to provide, among other things, an effective means to measure water use, to end delivery of water to unentitled lands, and to assure compliance with such measures by project water users. *Id.* at 258.

Endangered Species Act

The Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, requires Reclamation to review its programs and utilize them in furtherance of the purposes of the ESA. 16 U.S.C. § 1536(a)(1). Reclamation has an obligation not to engage in any action that is likely to jeopardize the continued existence of a listed species. In addition, Reclamation must consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (with respect to anadromous species) to insure that any action is not likely to jeopardize the

continued existence of a listed species or result in the destruction or adverse modification of critical habitat of such species.[12] *Id.* § 536(a)(2). If as a result of such consultation, FWS or NMFS, as appropriate, finds that the action will result in the incidental taking of a listed species but is not likely to jeopardize the continued existence of the species, or that there is a reasonable and prudent alternative to the proposed action that will avoid such jeopardy, then FWS or NMFS will set forth the impact of such incidental taking, the reasonable and prudent measures necessary to minimize such impact, and the terms and conditions that Reclamation must comply with to implement such measures. *Id.* § 1536(b)(4).

Two species of sucker fish that occupy Upper Klamath Lake and its tributaries (as well as other water bodies within and adjacent to the project) have been listed as endangered under the ESA and Reclamation has consulted with the FWS with respect to the effects of project operations on these species. The FWS issued a Biological opinion in 1992 (Long Term Biological Opinion) that set certain mandatory lake level elevations for Upper Klamath Lake necessary to avoid jeopardizing the species.

The coastal steelhead has been proposed for listing by NMFS. 60 Fed. Reg. 14253 (March 16, 1995). Reclamation has, through the conferencing provisions of the ESA, *Id.* § 1536(a)(4), determined that the 1995 operations of the Klamath Project will not jeopardize the continued existence of the steelhead. NMFS has concurred in this determination.[13]

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[12] Critical habitat has not been designated for the Lost River and shortnose suckers.

[13] A petition to list the chinook salmon has been received by NMFS. 60 Fed. Reg. 30263 (June 8, 1995). NMFS has proposed to list the coho salmon. ___ Fed. Reg. (__ July _, 1995).

Conclusion

None of the rights discussed above are quantified (except see footnote 1). Even so, Reclamation is not free to disregard these rights, and its discretion to determine the necessary means to protect and fulfill each of these rights is limited. Reclamation must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights. Reclamation must also, consistent with its statutory, contractual and trust obligations, fulfill the rights of the project water users and the refuges.

/s/ David Nawi

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[SEAL]

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

March 18, 1996

Martha Pagel, Director
Water Resources Department
158 12th Street NE
Salem, OR 97310

Re: Klamath Adjudication
DOJ File No. 690-002-G0037-86-0010

Dear Ms. Pagel:

You have asked for a description of the types of claims likely to be asserted by the federal government in the Klamath Basin adjudication, and an analysis of water management authority in the basin pending the completion of the adjudication. The questions follow the Ninth Circuit Court of Appeals decision in *US v. Oregon*, 44 F.3d 758 (9th Cir. 1994), *cert denied sub nom Tribe v. State of Oregon*, __ US ___, 116 SCt 378, 133 LEd 2d 302 (October 30, 1995). The case affirmed Oregon's authority, under the McCarran Amendment, to adjudicate

federal and tribal water rights claims, and cleared the path for the adjudication to begin.[1]

The adjudication will resolve three general categories of claims in the Basin: the claims of private users holding individual water rights; the claims of Klamath Project Irrigation districts holding rights developed under the authority of the federal Reclamation Act and Oregon law; and the claims of federal agencies and tribes, holding federal reserved water rights. The Department has already received claims from private users in the Basin. The claiming period for this category of claims closed February 1, 1991. The Department may now open the claiming period for Klamath Project and federal reserved claims. All claims must be filed before the "open inspection period" (pursuant to ORS 539.090) since all claims must be available for inspection by all other parties to the proceeding at one time. After the open inspection period, the opportunity for contests, and the preparation of the Director's determination, the matter will be referred to the Klamath County Circuit Court for entry of the final decree.

Regardless of the legal *basis* of the claims, the state will adjudicate all claims under Oregon's adjudication law (ORS chapter 539). The adjudication will establish the relative priority dates as well as the nature and scope (*e.g.*, allowed rate, duty, use, place of use and point of diversion) of all claims. Once adjudicated, the state will then regulate water use as between the rights. *Pacific Live Stock Company v. Lewis*, 241 US 440, 36 SCt 637, 60 LEd 2d 1084 (1916). The state has authority under the McCarran Amendment (43 USC § 666)

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[1] The Ninth Circuit case did not resolve the claims of the Klamath Allottees Association, which asserted that individual tribal allottees were not required to pay filing fees. We believe the adjudication could continue even while those claims are being resolved, since the allottees' challenge to the state's underlying jurisdiction was conclusively resolved by the court's opinion.

and *US v. Oregon* to adjudicate these claims regardless of their legal basis (*i.e.*, state or federal law) and to issue water right certificates as evidence of those rights.

I. CLASSES OF CLAIMS

A. Private Water Rights

The unadjudicated rights of private appropriators are derived from state law, primarily the common law of prior appropriation based on the use of water initiated prior to February 24, 1909.[2] (Technically, Klamath Project water rights might be viewed as private water rights, held by non-federal entities, but these claims are discussed separately, below.) In addition, private individuals occupying property that was formerly Klamath Indian Reservation or federal forest land may be entitled to claim "Walton" rights for those lands. They have acquired a quasi-federal reserved right with the acquisition of the land to which the federal reserved right was appurtenant. *See Colville Confederated Tribes v. Walton*, 647 F2d 42, 50-51 (9th Cir 1981).

B. Klamath Project Water Rights

Water rights associated with the irrigation of the Klamath Project are based upon the federal Reclamation Act of 1902 (32 Stat 388) and a 1905 Oregon statute (1905 Or Laws ch 228) intended to assist the federal government in developing irrigation projects. The 1905 Oregon statute authorized the federal government to tie up unappropriated water of a river system for future irrigation projects by filing a Notice with the

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[2] Post-1909 water rights are acquired after an application for a water right has been evaluated under public interest standards, a permit granted, the use developed ("perfected"), and a certificate issued. Persons holding these rights have the right to be parties to the adjudication, and are allowed to contest the claims of others whose rights are being adjudicated. However, these post-1909 water right holders need not participate in the adjudication to re-establish or protect their rights.

state identifying its intention to develop a particular project. The United States' Notice with respect to the Klamath Project specified that:

> The United States intends to use the above described waters [of the Klamath River Basin] in the operation of works for the utilization of water in the State of Oregon under the provisions of the act of Congress approved June 17, 1902 (32 Stat. 388) known as the Reclamation Act. (Notice signed by T. H. Humpherys, Engineer of the U.S. Reclamation Service, dated May 17, 1905.)

The water was "deemed appropriated" under Oregon law when the United States made its filing. *In Re Waters of the Umatilla River* 88 Or 376, 385 (1918). The Reclamation Act, authorized the Secretary of the Interior to "locate and construct. . . irrigation works for the storage, diversion, and development of waters". 32 Stat. 388 § 2. The rights developed under the Reclamation Act and the 1905 Notice must, therefore, be used for the purpose specified in the Act and the Notice, that is, only for irrigation. A memo prepared by David Nawi, regional solicitor for the Department of Interior dated July 25, 1995 (Nawi memo), recognizes that whatever claims the Bureau will assert in the adjudication will be based on this authority.

Apparently, a dispute has emerged about who will actually own these rights. The Bureau may claim ownership of the water right under the Reclamation Act and its 1905 Notice. However, the United States Supreme Court has consistently held that water rights developed under a federal Reclamation Act project, (such as the Klamath Project) do not belong to the Bureau. "Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract . . . the water rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works." *Nevada v. United States*, 463 US 110, 125,

103 SCt 2906, 2916, 77 LEd 2d 509 (1983) (quoting *Nebraska v. Wyoming*, 325 US 589, 65 SCt 1332, 89 LEd 2d 1815 (1945)). *See also Ickes v. Fox*, 300 US 82, 57 SCt 412, 81 LEd 2d 412 (1937). The Bureau might hold the storage rights associated with the Klamath Project, since the Bureau may own the land covered by the reservoirs. However, a final determination of the ownership question will require further factual determination.

More likely, these water rights are held by the irrigation districts or perhaps by individual district members. Whether the right is owned by the district or its members is based upon the contractual arrangement between the districts and its members. See *In Re Waters of Willow Creek*, 119 Or 155 (1925).

C. Federal Reserved Water Rights

The class of claims which gave rise to the *US v. Oregon* law suit is that associated with federal agencies under *Winters v. United States*, 207 US 564, 28 SCt 207, 52 LEd 2d 340 (1908). *Winters* announced what has become known as the reserved rights doctrine. Under the reserved rights doctrine, when land is set aside from the public domain, enough of the then existing unappropriated water is reserved to satisfy the primary purpose(s) of the reservation. *United States v. New Mexico*, 438 US 696, 98 SCt 3013, 57 LEd 2d 1052 (1978); *Cappaert v. United States*, 426 US 128, 96 SCt 2062, 48 LEd 2d 523 (1976). The doctrine creates water rights impliedly, rather than expressly, and is an exception to Congress' explicit deference to state water laws in other areas. *United States v. New Mexico*, 438 US at 715. *See also San Carlos Apache Tribe v. Arizona*, 668 F2d 1093 (9th Cir 1982) and *Colville Federated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981).

For the Klamath Tribes, the reserved right purposes have been identified in *US v. Adair*, 723 F2d 1394, 1409 (9th Cir. 1983): "[T]he right to hunt, fish and gather*** [and]

convert[ing] the Indians to an agricultural way of life * * * qualify as primary purposes of the 1864 treaty." The reserved rights of other federal reservations, (national forests and wildlife refuges and the Crater Lake National Park, for example) will similarly be established for, and at the level necessary to accomplish their primary purpose(s), but "no more". *Cappaert* at 141.

The purpose of the foregoing discussion is not to pre-judge any of the claims. All claimants will be expected to establish the legal and factual basis for their claims. This description is intended to merely give a glimpse of the nature and complexity of the claims likely to be asserted by the various claimants. Once the rights have been adjudicated, the state will regulate between users based on priority date, regardless of how the right was created.

II. WATER MANAGEMENT PENDING COMPLETION OF THE ADJUDICATION

While the law is relatively clear with respect to water management after the adjudication is completed, recent assertions by the federal government have raised questions about how water must be used while the adjudication is in progress. Historically, the Bureau has managed the Klamath Project by diverting live flow from the Klamath River and water stored from the Upper Klamath Lake for irrigation in the Project, consistent with the Notice the United States filed at 1905. The Bureau has operated the storage projects consistent with irrigation use. Now the Bureau is asserting an obligation to change its management of the storage projects to benefit downstream fishery and trial interests, rather than irrigation uses.

A. State Regulation

While the state has the authority under the McCarran Amendment to both adjudicate and then administer, *i.e.*, regulate between, water rights, it is less clear how water must

be managed pending completion of the adjudication. Oregon has taken the position that it regulates neither in favor of nor against unadjudicated water rights. *Accord Rettkowski v. Department of Ecology*, 858 P.2d 232 (Wash. 1993); *South Delta Water Agency v. U.S., Dept. of Int.* 767 F2d 531 (1985) (quantification of federal water rights must occur before authority to administer those rights conferred under McCarran Amendment.)[3]

B. Federal Regulation

Because the state will not regulate unadjudicated rights, the federal government conceivably could. The basis of the proposed Klamath Project Operations Plan (KPOP), discussed below, is that the federal government asserts it has the authority to regulate water uses in the Basin, at least among the federal claimants, pending completion of the adjudication. I conclude that there is no such federal authority for three reasons, set forth below.

1. There is no federal regulatory authority or system. The Nawi memo does not identify any authority which authorizes the Bureau, or any federal agency, to regulate water uses under the prior appropriation doctrine. While the western states have developed elaborate systems to ensure the legal distribution of water among competing claimants, there is no parallel federal system. The purpose of the McCarran Amendment was to require federal and tribal participation in the states' water rights systems rather than to create a duplicative federal system.

2. The rights have not been determined. Until the completion of the Klamath Basin Adjudication, none of the federal, Klamath Project or private claims have been quantified.

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[3] Of course, we presume that all users exercise their rights within their legal limits, even though the state will not shut off unadjudicated rights (nor shut off any other user to satisfy the claim of an unadjudicated right).

In *South Delta Water Agency*, the United States asserted and successfully established the rule of law that no regulation of federal rights may occur until those rights have been adjudicated pursuant to the McCarran Amendment. The rule is based on the legal truism that regulation in favor of a water right necessarily requires a determination of what that right is. Any attempt to regulate unquantified rights creates both practical and legal problems. For example, since the California Tribes' claims are unquantified, there is no way to calculate the amount of water to which the tribes would be entitled. The Nawi memo concedes that there is not yet even a standard by which the tribal reserved rights can be quantified.[4]

Distribution of water to the wildlife refuges is also problematic. First, I understand that some land acquired for use as the wildlife refuges was acquired from the states of Oregon and California. As a technical matter, only land "set aside from the public domain" may acquire a reserved right, not formerly state or privately owned land. Second, if the United States does not agree with the 1950 Oregon AG opinion cited in footnote 6, at the time the refuges were created, all water in the basin was "redeemed appropriated" by the Klamath Project, and no unappropriated water could be reserved for the refuges or any other use.

Third, the Nawi memo assumes that the refuges are entitled to return flows from project water, or perhaps that the refuges can use water diverted for project use interchangeably for

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[4] Even if the adjudication had been completed, under *Adair*, a tribal reserved instream flow claim is only for the amount of water to support the tribal fishery as "currently exercised," 723 F2d at 1414, not as it may have been at the time the reservation was created. Thus, I do not believe that the tribal claim could be used as the basis to "restore" a fishery to what it may have been in the early part of the century. The fishing rights of the California tribes as currently exercised necessarily cannot require a change in the way the Klamath Project and other unadjudicated rights have historically been used.

refuge or irrigation uses. Under the Oregon law governing the irrigation rights, the return flows of water diverted for irrigation purposes, but still within the district's boundaries, are still under the control and subject to appropriation by the districts for the underlying (that is, irrigation) purposes. *Jones v. Warmsprings Irrigation District*, 162 Or 186, 91 P.2d 542 (1939); *Cleaver v. Judd*, 238 Or 266, 393 P.2d 193 (1964).

While return flows may be subject to appropriation by others, for example the refuges, those claims will always be inferior to the claims of the original appropriator. An appropriator who has acquired a right to return flows is at the mercy of the original appropriator, who may decide (or be ordered by the state) not to divert water at a rate that creates return flows. (The presence of return flows may be an indication that more water is being diverted than is necessary to satisfy the underlying beneficial use, and may therefore constitute "waste.")

3. Not all rights are subject to federal regulation. To be fair and effective, any system of regulation between rights in a prior appropriation system must necessarily include all holders of water rights. The prior appropriation system of water law requires that in times of shortage, the senior-most user (the user with the oldest, or most senior, priority date) may place a "call" on the water source. Then, the junior-most users, in reverse order of priority date, must cease to use any water until all senior users are completely satisfied. To work, every user must be subject to the system. The Bureau identifies no way that it can shut off junior users who are not under direct federal control, to satisfy the calls of senior appropriators. Only the state has the authority and the regulatory system to establish relative priority dates and enforce the priority system.

There are a number of rights junior to the Klamath Project rights, both in California and Oregon. For example, I understand that the Central Valley Project (CVP) in California diverts from the Trinity River (a tributary to the lower Klamath

River) an amount of water equal to the flow of the upper Klamath River. The CVP was authorized under the provisions of the Emergency Relief Appropriation Act of 1935, ch. 48, § 4, 49 Stat. 115, and reauthorized pursuant to the Rivers and Harbors Act of August 26, 1937, ch. 832, 50 Stat. 844, 850. Consequently, the CVP priority date is significantly junior to Klamath Project water rights. Presumably, there are other non-federal users in California and Oregon whose priority dates are junior to (and thus would be required to provide water to senior users before) the Klamath Project. California and Oregon will regulate users of the Klamath River based on priority date, not on the location of the state line, once the rights are established by court decree. ORS 540.045(3).

C. Bureau Reallocation of Klamath Project Water

A related and troubling issue has arisen because the Bureau is taking the position that "it must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights." Nawi Memo at 10. Implementing this advice, a draft of the Klamath Project Operations Plan (KPOP) purports to authorize the Bureau (at least pending completion of the adjudication) to reallocate water from irrigation uses to other unquantified and unadjudicated uses for the projection of fish and satisfaction of California tribal claims.

I do not dispute that the California tribes may have reserved water rights for fisheries and other purposes. However, the Nawi memo does not identify either how the amount of water the tribes are entitled to could be determine, or why a tribal "call" on the river could only be satisfied from Klamath Project water rather than by standard application of the prior appropriation system by regulatory the junior-most users first.

The KPOP aims to protect the downstream anadromous fish which have been proposed for listing under the federal Endangered Species Act (ESA). Until a listing is made, action

under the ESA seems premature. Also, while the Nawi memo argues the Bureau is required to exercise its statutory authority to preserve endangered fish, it does not identify the source of that authority. The ESA does not confer additional authority on the Bureau to protect the fish; rather, it requires the Bureau (and every federal agency) to exercise the authority it already possesses in a certain way. I am unaware of any independent grant of statutory authority to the Bureau which would allow the transfer of water from the Klamath Project to protect endangered fish. The Bureau exercised its statutory authority when it filed for all unappropriated water necessary to develop the Klamath Project pursuant to state statute and the 1902 Reclamation Act. It has identified no independent authority to reallocate water legally obligated to that original purpose.

The United States Supreme Court specifically rejected a United States' contention that it had the authority to unilaterally reallocate state-law based water rights acquired under the Reclamation Act to endangered fish protection or tribal treaty purposes. In *Nevada v. United States*, 463 US 110, 103 SCt 2906, 77 LEd 2d 509 (1983) the United States sought to reallocate water from irrigators within a federal project for the benefit of endangered fish and a tribal fishery. The Court rejected United States' position:

> We conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the Orr ditch decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushes of wheat, to be bartered, sold, or shifted about as the Government might see fit.

Nevada v. United States, 463 US at 1126, 103 SCt at 2916.

The Klamath Project water fights have not been adjudicated, but I see nothing in the rationale of *Nevada* which would justify a view that the United States could reallocate water rights acquired under the Reclamation Act pending completion of a

state adjudication. Rather, the court rejected inherent United States' authority to ignore the limitations of the water rights it held, stressing the disruption that would otherwise result.[5]

> We are bound to say that the Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West.

Id., 463 US at 121, 103 SCt at 2914.

Thus, while I recognize the United States' obligations to both Indian Tribes and endangered species, I do not see how a general governmental obligation can be converted to specific Bureau authority to reallocate water stored under a right acquired for irrigation in the Klamath project to either of these other uses, absent specific federal authorization for the new use and compliance with state law.

Several cases analyzing Bureau efforts to satisfy endangered fishery protection and tribal trust responsibilities from Bureau projects illustrate this analysis. In *Carson-Truckee Water Conservancy District v. Clark*, 741 F2d 257 (1983), the Ninth Circuit held that the bureau could operate the Stampede Reservoir (located in California) for the purpose of maintaining endangered fish in the Pyramid Lake (located in Nevada) and to satisfy its trust obligations to the Pyramid Lake tribe. However, those uses were allowed because the reservoir had been specifically authorized for the purpose of protecting fish

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[5] The Bureau may be able to reach the same result by "transferring" the water right from irrigation use to fishery purposes. The state allowed the use of water stored for irrigation purposes in McKay reservoir (under the authority of the Reclamation Act and the 1905 Oregon law) to be transferred to fishery and tribal purposes upon compliance with state transfer law. The Bureau in that case had separate authority under the federal Umatilla Basin Project Act to allow the use of the Umatilla Project for non-irrigation uses. A transfer can occur only after the right is decreed, however, ORS 540.505(4).

and wildlife and the Bureau water was legally stored in the reservoir under a permit from the state of California for those purposes. No state water rights (from either state) had been acquired to use the water for irrigation, municipal or industrial purposes, although the authorizing act would have allow water rights for those purposes. The Court held the Bureau could not be forced to provide water to uses (municipal and industrial) for which neither it nor the districts held a right.

Here, however, the Klamath Project has acquired vested rights under state law for all unappropriated water as of 1905 necessary to satisfy the Klamath Project beneficial uses.[6] While that right will be quantified in the adjudication, the Nawi memo recognizes that the Klamath Project's claim for both the storage of water in the Klamath Lake and for diversion of live flow into the Klamath Project system is pursuant to irrigation rights developed under the Reclamation Act and state law.

O'Neill v. United States, 50 F.3d 677 (9th Cir. 1995) further illustrates this point. In *O'Neill* the court noted that Congress amended the Central Valley Project Act by means of the Central Valley Project Improvement Act (CVPIA), Publ. L. No. 102-575, 106 Stat. 4706 *et seq.*, to require the Bureau to satisfy fishery needs. The CVPIA created the specific statutory

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[6] Technically, the United States acquired absolutely all unappropriated water of the Basin by its filing in 1905, so long as it was developed for irrigation purpose pursuant to the Reclamation Act and the 1905 Oregon statute. That reservation has not ever been technically relinquished, but I assume that the United States does not intend to disagree with the 1950 Oregon Attorney General Opinion, 25 Op Atty Gen 62, that determined that water which was not developed by at least 1950 was available for appropriation by others. Should the United States take the position that it still had all water unappropriated as of 1905 tied up under its 1905 filing for purposes of continuing the development of irrigation in the Klamath project, there would be no water available to reserve for purposes of the wildlife refuges, developed after 1905, nor for any other post-1905 federal reserved or other water right.

authority necessary to allow the Bureau to provide water for endangered fish. By contrast, in the Klamath Project situation, the Nawi memo does not identify, nor am I aware of, any corresponding federal law to authorize these new uses of water stored in the Klamath Lake to which the Klamath Project irrigation districts are entitled.

The KPOP must be based on legal authority (even if unadjudicated at present) which the bureau presently has. I am unaware, and the Nawi memo does not identify, what authority that might be.

CONCLUSION

Water rights for the Klamath Project were acquired for irrigation purposes. No state or federal authority has reallocated this irrigation right to other uses. The specific nature and scope of Klamath Project, federal reserved and private water rights will be determined in the Klamath Basin Adjudication.

Additional Questions to Be Answered in Separate Advice

In meeting with officials from the State of California, we have also identified a number of other issues relating to overlapping or ambiguous jurisdiction between the two states. Those questions will be the subject of separate advice.

Sincerely,

/s/ STEVE SANDERS

STEPHEN E.A. SANDERS
Assistant Attorney General
Natural Resources Section

[Dated Jan. 9, 1997]

UNITED STATES DEPARTMENT OF THE INTERIOR

[SEAL]

OFFICE OF THE SOLICITOR
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Memorandum

To: Regional Director, Region 1, U.S. Fish and Wildlife Service, Portland, OR
Regional Director, U.S. Bureau of Reclamation, Mid-Pacific Region, Sacramento, CA
Area Director, Portland Area Office, Bureau of Indian Affairs, Portland OR
Area Director, Sacramento Area Office, Bureau of Indian Affairs, Sacramento, CA

From: Regional Solicitor [David Nawi]
Pacific Southwest Region

Regional Solicitor [Lynn Peterson]
Pacific Northwest Region

Subject: Oregon Assistant Attorney General's March 18, 1996, Letter Regarding Klamath Basin Water Rights Adjudication and Management of the Klamath Project

As requested, we have reviewed the March 18, 1996, letter from Stephen Sanders, Assistant Attorney General, Natural Resources Section, to Martha Pagel, Director, Oregon Water Resources Department (OWRD) (March 18 letter). The March 18 letter responds to a request of the Director of the OWRD for "a description of the types of claims likely to be asserted by the federal government in the Klamath Basin adjudication, and

an analysis of water management authority in the basin pending the completion of the adjudication." We are responding jointly because the March 18 letter addresses issues of concern to agencies within the responsibility of both the Pacific Southwest and the Pacific Northwest Regions of the Solicitor's Office.

The issues raised in the March 18 letter arise in the context of actions by the Secretary of the Interior (Secretary) , acting through the Bureau of Reclamation (Reclamation) , to manage and operate the Klamath Project (Project) and particularly to develop a Project operations plan. In so doing, Reclamation and other Federal agencies with responsibility related to water and wildlife resources, including Indian trust resources, in the Klamath Basin (Fish and Wildlife Service, Bureau of Indian Affairs, and National Marine Fisheries Service) are engaged in a process of consultation with and consideration of the interests of diverse groups, including agricultural water users, Indian tribes, and wildlife interests, regarding Project operations and the development of a plan intended to govern operations pending completion of the Klamath Basin adjudication presently being conducted by the State of Oregon.[1]

The March 18 letter raises issues regarding the authority of the Secretary to manage the Klamath Project pending completion of the adjudication, as well as issues regarding the United States' water rights, including tribal water rights the United States holds in trust, in the Klamath Basin. The March

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[1] Upon completion of the adjudication and pursuant to section 8 of the Reclamation Act of 1902, the Project will be operated in accordance with the outcome of the adjudication, as well as with other applicable requirements, and the operations plan will be revised as appropriate. As discussed throughout this memorandum, many of the issues raised in the March 18 letter arise as a result of Reclamation's need to meet its obligations and responsibilities in operating the Project, the absence of a completed adjudication of the Klamath Basin, and the lack of any other action by the State of Oregon to administer junior water rights in relation to senior unadjudicated water rights in the Basin.

18 letter is in wide circulation and may be read as calling into question the legal basis of various federal actions to manage the Project, including the development of an operations plan. Our conclusions regarding a number of the issues differ from those contained in the March 18 letter. For these reasons, we think it important to set out in general terms our views on the major issues for our client agencies and interested parties.

This memorandum reaffirms long-standing positions of the United States regarding management of water projects for irrigation, wildlife protection, and Indian rights, and builds on the July 25, 1995, memorandum from the Regional Solicitor, Pacific Southwest Region, to the Regional Director, Bureau of Reclamation, Mid-Pacific Region (July 25 memorandum).[2] This memorandum does not attempt to provide a complete legal analysis of all the issues raised by the March 18 letter. Further legal analysis will be presented, as needed, in connection with the adjudication or otherwise.

I. Management of the Klamath Project.

The March 18 letter states that the United States, through development of an operations plan by Reclamation, is asserting that it has the authority to regulate water uses in the Klamath Basin where no such authority exists. March 18 letter, page's 5-7. The United states is not, however, seeking in the operations plan to preempt or supplant the State's role in adjudicating and administering water uses; rather, it is carrying

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[2] The March 18 letter contains several references to the July 25 memorandum, which describes the general rights to the waters of the Klamath and Lost River drainages affected by the operation of the Klamath Project and the obligations of the Bureau of Reclamation to the holders of these rights. We adhere to the conclusions set forth in the July 25 memorandum. This memorandum addresses additional issues not raised in the July 25 memorandum.

out the responsibilities federal law places on it in managing the Klamath Project.[3]

An operations plan is being developed through an open process, including consultation with affected government and other interests and an opportunity for public comment, to arrive at an informed decision regarding Reclamation's operation of the Project pending completion of the adjudication. Reclamation is using this process to review Project operations to assure that they are consistent with all of Reclamation's responsibilities and obligations concerning senior water rights, tribal trust resources, Project water users' contractual rights, the Endangered Species Act (ESA) and other requirements mandated by law and within the authority of the Secretary.[4]

The March 18 letter states that it is unclear how water must be managed pending completion of the adjudication and declares that the state will not regulate or administer unadjudicated water rights or water uses. March 18 letter, page 5. The March 18 letter also asserts that the federal government lacks authority to manage any water uses in the basin, even those involving water rights and uses subject to

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[3] The March 18 letter refers to the project operations plan as the Klamath Project Operations Plan or "KPOP." KPOP is no longer the label applied to the operations plan now being developed which will address project management pending completion of the Klamath Basin adjudication being conducted by the State of Oregon. Our analysis of the underlying authorities is applicable to whatever operations plan is ultimately adopted.

[4] The March 18 letter bases its analysis and conclusions on the proposition that the 1905 water rights filing by the United States for development of the Klamath Project is limited to irrigation uses. ("The rights developed under the Reclamation Act and the 1905 Notice must, therefore, be used for the purpose specified in the Act and the Notice, that is, only for irrigation." March 18 letter, page 3.) This memorandum focuses on the issue of authority raised in the March 18 letter. The nature of the Project water rights will be addressed at the appropriate time in the pending adjudication.

federal law. For the reasons set out below, we have a different view.

The Secretary, through Reclamation, must manage and operate reclamation projects developed pursuant to the Reclamation Act of 1902 (43 U.S.C. § 372 *et seq.*, Act of June 17, 1902, 32 Stat. 388) and its amendments and supplements. Specifically, section 10 of the Reclamation Act, 43 U.S.C. § 373, expressly directs the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper" to carry out the reclamation laws. *See United States v. Alpine Land and Reservoir Co.*, 887 F.2d 207, 212 (9th Cir. 1989). Districts and water users within the project must comply with such actions taken pursuant to section 10 and pursuant to contracts between Reclamation and the districts and water users. *Id.*; *Pyramid Lake Paiute Tribe v. Hodel*, 878 F.2d 1215 (9th Cir. 1989); *Truckee-Carson Irrigation District v. Secretary of Department of Interior*, 742 F.2d 527 (9th Cir. 1984), *cert. denied*, 472 U.S. 1007 (1985). The operations plan process and resulting plan are clearly authorized by section 10 of the Reclamation Act of 1902. *See* July 25 memorandum for further discussion.[5]

The federal courts have not hesitated to order the Secretary to fulfill his tribal trust obligations and to comply with the ESA in operating reclamation projects. *See Pyramid Lake Paiute Tribe v. Morton*, 353 F. Supp. 252, 255-56 (D.D.C. 1973). The Secretary, through Reclamation, must operate reclamation projects consistent with vested, fairly implied senior Indian

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[5] *See also Israel v. Morton*, 549 F.2d 128, 132-33 (9th Cir. 1977) (water obtained from a federal reclamation project is not there for the taking by the landowner, but for the giving by the United States, and terms upon which water can be put to use, and manner in which rights to use can be acquired, are only for the United States to fix, and if such rights are subject to becoming vested beyond the power of the United States to take without compensation, such vesting can only occur on terms fixed by the United States).

water rights. *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033 (9th Cir.), *cert. denied*, 474 U.S. 1032 (1985) (district court did not abuse its discretion in ordering Reclamation to make water available to protect unquantified, unadjudicated treaty-reserved fisheries related water rights); *Pyramid Lake Paiute Tribe v. Morton*, *supra* (Secretary of the Interior "was obliged to formulate a closely developed regulation that would preserve water for the Tribe . . . [and] to assert his statutory and contractual authority to the fullest extent possible to accomplish the result." *Id.* at 256). *Cf. Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988) (prior to allocating water from a federal irrigation project among project water users, the Department had to adequately protect the tribe's senior instream flow water rights). *See also Parravano v. Babbitt*, 861 F. Supp. 914 (N.D. Cal. 1994), *aff'd.*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2546 (1996) (Secretary of Commerce properly considered the tribe's federally reserved fishing rights in issuing emergency regulations reducing harvest limits of Klamath River salmon).

Moreover, a specific statutory directive is not needed for Reclamation to manage irrigation deliveries to protect senior tribal water rights. Although the Klamath Tribe's water rights have not yet been quantified in an adjudication, the existence of the Klamath Tribe's rights to the water needed to protect their treaty-reserved hunting and fishing rights (with a priority date of time immemorial) and for agricultural uses has been confirmed by the Ninth Circuit Court of Appeals. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). The Yurok and Hoopa Valley Tribes in California hold unadjudicated water rights which vested at the latest in 1891 and perhaps as early as 1855. *See, e.g., United States v. Adair*, *supra*; *Arizona v. California*, 373 U.S. 546, 600 (1963); *United States v. Winans*, 198 U.S. 371

(1905). *Cf.* Solicitor's Opinion, M-36979, Fishing Rights of the Yurok and Hoopa Valley Tribes (Oct. 4, 1993).[6]

While the March 18 letter asserts that "[o]nly the state has the authority and the regulatory system to establish relative priority dates and enforce the priority system," March 18 letter, page 7, both federal and state courts have jurisdiction in appropriate cases to establish and enforce the priority system. *See, e.g., Cappaert v. United States*, 426 U.S. 126 (1976) and *Winters v. United States*, 207 U.S. 564 (1908). In addition, nothing in the McCarran Amendment, 43 U.S.C. § 666, prohibits the United States from managing and operating its reclamation projects. The priority water rights system is one of the bases upon which reclamation projects are operated. While Reclamation does not adjudicate water rights, the absence of a completed adjudication and Reclamation's legal obligation to manage the project in accordance with law require that Reclamation use its best efforts to operate the project consistent with existing water rights.

The March 18 letter further asserts that regulation in favor of senior tribal, federal, and project water rights may not occur until those rights have been adjudicated and cites *South Delta Water Agency v. U.S. Department of the Interior*, 767 F.2d 531 (9th Cir. 1985), as supporting the proposition. March 18 letter, pages 5-6. However, that case does not address the issue. The Ninth Circuit merely held that, contrary to the State of California's argument, suit cannot be brought pursuant to

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[6] Although tacitly recognizing the fisheries reserved water rights of the Klamath Tribes and the Yurok and Hoopa Valley Tribes, the March 18 letter questions without answering the extent of the Klamath tribal right, and implies that the Yurok and Hoopa Valley Tribes' rights are "paper" rights with no enforceability. March 18 letter, pages 6-7, fn. 4. As discussed above, and in the July 25 memorandum, pages 4-5, in our view the tribes' rights are senior and enforceable against junior uses, and adjustments may be required in how the Klamath Project is operated to be consistent with the tribes' rights.

the McCarran Amendment against the United States for the administration of water rights without a prior general stream adjudication having determined those rights.

The State of Oregon has declined to administer junior rights to protect senior tribal, project, and other federal rights on the grounds that such rights are unknown until the adjudication is complete. However, in the absence of a completed adjudication or other determination of the senior water rights, the project must be operated based on the best available information. For example, the Project irrigation water rights can be reasonably estimated. Similarly, although the tribal instream flow and lake rights are complex, they also may be reasonably estimated; and even though unadjudicated, they are vested, senior rights, and Reclamation must operate the project consistent with those rights. *Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States*, *supra*, at 1131-32. ("The priority date of time immemorial obviously predates all competing rights" and to ignore this would violate "the fundamental principles of the appropriative system of water rights.")

The March 18 letter also states that users junior to the Klamath Project should provide water to senior rights holders before the Project does so. March 18 letter, page 7. We agree that to do so best comports with the priority system of water rights administration. But the March 18 letter does not address the situation, as in this case, where the State is not protecting senior water rights. Moreover, the March 18 letter offers no avenue or mechanism for effecting calls on junior users. It adopts a hands-off position even though the State is in a better position to deal with junior nonfederal water users.[7] In such

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[7] The March 18 letter sets forth at page 5 Oregon's position that it "neither regulates in favor of nor against unadjudicated water rights." The letter fails, however, to discuss whether the State has authority to regulate junior water rights in relation to senior unadjudicated rights prior to completion

a situation, the Secretary must exercise what authority he has in managing the Project to protect senior water rights and meet requirements of federal law.

We disagree with the assertions in the March 18 letter regarding the water rights for the national wildlife refuges.[8] March 18 letter, pages 5-6. Among others, bases for the refuge water rights include state-based rights perfected by applying project water or return flows to beneficial use, and federal reserved rights to the water unappropriated at the time of the refuges' creation and needed to carry out the refuges' purposes. *See Arizona v. California*, *supra*, at 598.

In sum, the operations plan is not an attempt to regulate water uses in the Klamath Basin. Rather, it reflects Reclamation's effort to exercise its authority to manage the project consistent with all of its obligations, including senior

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of the adjudication, and if so, whether the State should exercise that authority in the Klamath Basin. This has contributed to the demand for Reclamation to prepare an operations plan.

[8] Although the distinction may not be at issue here, we also disagree with the view expressed at page 6 of the March 18 letter that "[as] a technical matter, only 'land set aside from the public domain' may acquire a reserved right" and not land acquired by the United States. *See* Memorandum, Department of Justice, office of Legal Counsel, June 16, 1982, at pages 77-78. In that opinion, the issue of reserved rights for acquired lands was directly addressed:

> Much of the language used by the Court to describe the scope of the reservation doctrine, in fact, it is broad enough to cover all lands set aside for a particular federal purpose, regardless of the prior ownership of the land . . . . [I]n [*United States v. New Mexico*], the Court did not suggest that the reserved rights doctrine applies only to lands that may be formally reserved from the public domain; it recognized rather that the doctrine applies to any land that has been set aside as national forest (which could be reserved or acquire lands). *See* 438 U.S. at 698-99.

Id. at 78.

Indian water rights, contractual obligations and ESA requirements. *See Pyramid Lake Paiute Tribes v. Morton, supra*; *United States v. Alpine Land and Reservoir Co., supra*.[9]

II. The Project Operations Plan is not a "Reallocation" of Klamath Project Water

The March 18 letter states that obligations to Indian tribes and listed species do not provide authority to "reallocate" water absent specific federal authority for the new use and compliance with state law. March 18 letter, page 9; *see also* pages 3, 5, 8, 10, 11. Once again, we believe the March 18 letter mischaracterizes the nature of the issue. The lack of a completed water rights adjudication does not legitimize uses of water that would not otherwise be authorized. Reclamation's actions are intended to result in management and operation of the Klamath Project in a manner which is consistent with and carries out all its legal obligations and responsibilities. Operation of the project to reflect Reclamation's obligations is not a reallocation of water.

The March 18 letter cites several cases to support the proposition that Project water stored under a water right "acquired for irrigation" cannot be used to meet the United States' obligations to Indian tribes and under the ESA. March 18 letter, pages 9-10. In our view, the cases cited either do not apply to the situation at hand or do not support the proposition that the United States may ignore Indian water rights or its obligations under the ESA.

In *Nevada v. United States*, 463 U.S. 110 (1983), the Supreme Court simply held that the United States could not

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[9] For the Newlands Project, discussed in *United States v. Alpine Land and Reservoir Co., supra*, the initial project operation criteria and procedures (OCAP) were issued prior to a final adjudication of water rights in the Newlands Project, while the final OCAP were adopted after the final decree was affirmed. The *Alpine* decision upheld the final OCAP.

ignore the limits of decreed federal reserved or other water rights where all the water rights, including the Indian rights, had already been fully adjudicated. *Nevada* does not address the issue of whether project operations must be consistent with existing senior water rights or the ESA where none of the water rights have been fully adjudicated.

In *Carson-Truckee Water Conservancy District v. Clark*, 741 F.2d 257 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985), the court found that the Secretary's decision to operate Stampede Dam solely for the purpose of conserving an endangered species of fish was not arbitrary. Although the court explicitly found that it need not address tribal water rights to reach its decision, the court stated that any asserted obligation of the Secretary to enter into contracts for the sale of project water for municipal and industrial purposes pursuant to the project's authorizing legislation should be considered only when his superseding obligations to the Tribe and under the ESA have been fulfilled. (This case concerned the same Reclamation project that was the subject of *Nevada v. United States*. However, the water rights connected with Stampede Dan are not adjudicated.)

Likewise, in *O'Neill v. United States*, 50 F.3d 677 (9th Cir.), *cert. denied*, U.S. 116 S. Ct. 672 (1995), the court held that the United States was not liable for not furnishing the full contractual amount of water to water users when that amount could not be delivered consistent with the requirements of the ESA and the Central Valley Project Improvement Act, Pub. L. No. 102-575. The court found that the provisions in the contract which precluded federal liability for water shortage were broad enough to include the "mandates of valid legislation."[10]

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[10] Similar shortage provisions are found in Klamath Project contracts.

Reclamation is mandated by the ESA to avoid jeopardizing the continued existence of listed species and to conserve listed species.[11] In addition, individual water users and water districts, as well as Reclamation, are subject to the prohibition in section 9 of the ESA on taking listed species. *See, e.g., United States v. Glenn-Colusa Irrigation District*, 788 F. Supp. 1126 (E.D. Cal. 1992).

As a final matter, the March 18 letter seen to assume that once the Klamath Basin adjudication is completed and the State begins administering the water rights, the Secretary will no longer need to manage the Project. *See, e.g.*, March 18 letter, pages 2, 4-5. The cases make clear, however, that the Secretary's authority and responsibilities under federal law to manage the Project will continue, concurrent with the requirement to operate the Project consistent with adjudicated water rights. *See Pyramid Lake Paiute Tribes v. Morton, supra* and *United States v. Alpine Land and Reservoir Co., supra*, cases which involved previously adjudicated project water rights.

III. The Klamath Basin Adjudication

The March 18 letter addresses the three general categories of claims the author believes will be resolved in the Klamath Basin adjudication. We do not propose to address these issues now. The United States will make appropriate arguments and set forth in full the federal position regarding these issues in the course of the adjudication. We do, however, make the

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[11] Reclamation is also obligated to confer with the Fish and Wildlife Service or the National Marine Fisheries Service on any action which is likely to jeopardize the continued existence of any species proposed to be listed, and is authorized to take conservation measures to minimize impacts on the proposed species. ESA, section 7(a)(4), 16 U.S.C. § 1536 (a)(4), and section 5(a), 16 U.S.C. § 1534(a).

observations set out below with respect to certain points raised in the March 18 letter concerning the adjudication.[12]

The March 18 letter states that Klamath Project water rights "likely . . . are held by the irrigation districts or perhaps by individual district members" rather than by the United States. March 18 letter, page 4. It is well established, however, that the United States through the Bureau of Reclamation holds the legal title to the water rights for the project. *Nevada v. United States*, *supra*; *Ide v. United States*, 263 U.S. 497 (1924); *United States v. Humboldt Lovelock Irr. Light & Power Co.* 97 F.2d 38 (9th Cir. 1938), *cert. denied*, 305 U.S. 636 (1938); *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1942); *see also* Solicitor's Opinion, M-36966, 97 I.D. 21, Filings of Claims for Water Rights in General Stream Adjudications (July 6, 1989); Solicitor's Opinion, M-36967, 97 I.D. 32, Authority to Provide Water to Stillwater Wildlife Management Area (July 10, 1989). In 1905, the United States, through the Secretary of the Interior, pursuant to the Reclamation Act of 1902 and Oregon law, initiated the appropriation of the amount of water necessary to develop the Klamath Project.

The United States Supreme Court has long held that individual water users who have entered into contracts with the United States to receive project water, hold a beneficial interest in that portion of the project water right actually put to beneficial use. *Nevada v. United States*, *supra*; *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Ickes v. Fox*, 300 U.S. 82 (1937). Unlike the United States and individual water users, in

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[12] The March 18 letter was written by an Assistant Attorney General of the State of Oregon who we understand will advise the decision maker in the administrative phase of the adjudication. Several aspects of his letter raise a concern that he appears to have taken positions on issues to be determined in the adjudication before the parties have had opportunity to brief and litigate them.

the typical case irrigation districts hold neither a legal nor beneficial interest in the water right. They have no property interest in the water, nor have they in their own right diverted the water to storage. *Truckee-Carson Irrigation District v. Secretary of the Interior*, *supra*. Moreover, the districts have not put the water to beneficial use and thus do not hold an interest in the water right.

In light of the foregoing, Reclamation is the proper entity to file claims on and hold the water rights for the Klamath Project, 97 I.D. 21, recognizing the beneficial interest of individual water users entitled to use project water for beneficial uses, provided that the use comports with the terms of applicable Reclamation contracts and state and federal law.

Although the March 18 letter does not discuss the subject, there are federally owned lands within the project boundaries that receive project water. The United States is the proper party to file for those water rights in this situation, where the United States holds both the legal and beneficial interests in the lands and the water.

Finally, the United States has control of the project return flows within the boundaries of the project, has the right to use the return flows, and has the right to continue such use. *Ide v. United States*, *supra*. Contrary to assertions in the March 18 letter, the United States Supreme Court did not hold in *Ide* that use of recaptured water had to be the original use; the Court merely held that the recaptured water had to be beneficially used. Thus, we do not believe that *Ide* or subsequent cases preclude the United States from using return flows for uses other than irrigation and domestic purposes.

Similarly, *Jones v. Warmsprings Irrigation District*, 91 P.2d 542 (Or. 1939), is not applicable to circumstances where water remains within the project boundaries and control of the appropriator; that case concerned return flow deemed to be abandoned because there had been no indication of an attempt

to recapture. Finally, the Oregon Supreme Court in *Cleaver v. Judd*, 393 P.2d 193 (Or. 1964), recognized that under Oregon law an appropriator is justified in recapturing waste, seepage, and occasional surface water runoff.

IV. CONCLUSION

Pending completion of the adjudication, Reclamation is authorized and obligated to manage and operate the Klamath Project consistent with all of Reclamation's responsibilities and obligations concerning senior water rights, tribal trust resources, Project water users' contractual rights, the Endangered Species Act and other requirements mandated by law and within the authority of the Secretary. These obligations may be clarified or otherwise affected by the pending adjudication; however, Reclamation will continue to have authority to manage and operate the Project consistent with its obligations after completion of the adjudication.

Supreme Court, U.S.
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No. 99-1723

IN THE

Supreme Court of the United States

KLAMATH DRAINAGE DISTRICT; KLAMATH WATER USERS PROTECTIVE ASSOCIATION; SAM HENZEL; HENZEL PROPERTIES, LTD.,

Petitioners,

v.

ROGER PATTERSON; KARL E. WIRKUS; ELUID MARTINEZ; PATRICIA BENEKE; BRUCE BABBITT; UNITED STATES BUREAU OF RECLAMATION; UNITED STATES OF AMERICA; PACIFICORP; YUROK TRIBE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT YUROK TRIBE

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QUESTION PRESENTED

Whether the court of appeals departed from the usual and accepted course of judicial proceedings by resolving tribal water rights issues presented in litigation challenging the 1997 Operations Plan of the Bureau of Reclamation for the Klamath Irrigation Project, which plan determined that water should be made available to Klamath Basin Indian Tribes in compliance with federal legal obligations.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete in several respects and misleading in others. Those relevant aspects of the case either omitted or mischaracterized by Petitioners are discussed below.

Respondent Yurok Tribe, intervenor below, is a federally-recognized Indian tribe that resides on a reservation straddling the Klamath River a mile on each side for the last 45 miles as it makes its way to the Pacific Ocean. For centuries the Yurok Tribe has relied on the Klamath River for its subsistence, cultural and religious needs. The Tribe intervened on the side of the federal defendants and PacifiCorp, based on the Tribe's well-founded belief that diversions from the Klamath Project are depleting water from the Klamath River that would otherwise be available for the Tribe's anadromous fishery. The Project also has demonstrable effects on the quality of water and habitat on which fish depend. SER 89 ("Instream Flow Requirements for Tribal Trust Species in the Klamath River," prepared by Trihey & Associates, March, 1996). Because this litigation raised important issues concerning the Bureau of Reclamation's (hereafter "Reclamation") operation of the Klamath Irrigation Project, the Tribe participated in every stage of the case.

The Yurok Tribe maintained throughout this litigation that Reclamation has a legal duty to operate the Klamath Project to make water available in compliance with federal obligations to satisfy tribal water rights. The Tribe raised these issues at the earliest opportunity, fully briefed them at each stage of the case and responded to petitioners' arguments in opposition to the Tribe's interests. To support

its arguments, the Tribe submitted into evidence the report of a hydraulic engineer who quantified instream flows required to sustain healthy fish habitat in the Klamath River and the report of an hydrologist who assessed the effect of the Klamath Project on instream flows and fishery habitat in the Klamath Basin. SER 78-134; SER 135-224 (Trihey & Associates, "Instream Flow Requirements for Tribal Trust Species in the Klamath River," March, 1996; Barry Hecht and Gregory Kamman, "Initial Assessment of Pre- and Post-Klamath Project Hydrology on the Klamath River and Impacts of the Project on Instream Flows and Fishery Habitat," March, 1996). These reports, which were not controverted by the petitioners, formed the factual basis of the Yurok Tribe's opposition to the arguments of the petitioners that Reclamation lacked the legal authority and duty to operate the Klamath Project to satisfy tribal water and fishing rights. From the beginning of the case, petitioners were on notice that tribal water rights and the authority of Reclamation to protect such rights were part of this case.

The history of the Yurok Tribe's relationship to and dependence on the Klamath River must be appreciated in order to understand the scope of this case. For centuries and long before the arrival of Europeans, the Yurok Tribe has relied on water from the Klamath River to support its tribal salmon fishery, culture and economy. The courts have recognized that the Yurok Tribe has used water in the Klamath River for fishing and other purposes "long before the white man came," and such rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981). Based on the Yurok Tribe's ancient usage of the Klamath River and the purpose for which the Tribe's Reservation was created in 1855, the courts have held that

the Yurok Tribe has federally-protected fishing rights in the waters of the Klamath River. *Parravano v. Masten*, 70 F.3d 539, 546 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996). Because the instant case practically and legally affects the amount of water available in the Klamath River for the use of the Yurok Tribe — water essential for the Tribe's fishing way of life — the Yurok Tribe intervened in support of Reclamation's authority and duties to satisfy tribal water and fishing rights.

A. Petitioners' request has been uniformly rejected by the lower court.

With respect to the proceedings below, petitioners' Statement of the Case neglects to note that except for the amendment of the Opinion, the Court of Appeals denied both the petition for panel rehearing and the petition for rehearing en banc. Thus, not a single judge of the court of appeals believed that the arguments petitioners advance in this Court were sufficiently meritorious to warrant consideration by the court en banc. As the amended opinion notes, "[t]he full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing." Pet. App. at 2a.

B. Petitioners mischaracterize the nature of the water rights at issue.

Petitioners misrepresent the relative legal gravity of their water rights as compared with the rights of Indian tribes in the Klamath Basin. In the Klamath Basin there has not yet been an adjudication of *anyone's* rights, so petitioners' water rights are no more adjudicated than the rights of the tribes. Yet petitioners consistently refer to their own water rights

as "vested" or "statutorily recognized," while at the same time denigrating tribal rights as "unadjudicated." Pet. at 3, n.2 and 14. Petitioners imply that their own asserted water rights can be vindicated now, in this case, while any recognition of tribal water rights must await some future adjudication. By this mischaracterization, petitioners ask this Court (as they asked the lower courts) to give petitioners a free hand to argue against federal recognition of tribal rights, while forbidding any consideration of the positive, established federal obligation to respect tribal water rights.

C. Petitioners mischaracterize the effect of Reclamation's 1997 Operations Plan.

Petitioners suggest that the amounts of water dedicated by Reclamation to tribal and Endangered Species Act purposes are "high." Pet. at 6. This is a very subjective characterization. Although the amounts are indeed higher than Reclamation has often provided in the past, they are by no means higher than the amounts historically enjoyed by the tribes for fishing and hunting purposes.

D. The United States does not agree that its obligations to Indian tribes play no role in this case.

Despite the incontrovertible nexus between petitioners' claims under the 1956 contract and the tribal water claims, petitioners suggest that the United States agreed that the issues of tribal water rights and the authority of Reclamation to satisfy such rights are beyond the scope of matters raised by the complaint and amended counterclaim. Pet. at 9. To the contrary, the United States recognized that petitioners' assertion of rights to additional water under the 1956 contract directly implicated the authority of Reclamation to satisfy

tribal water rights. U.S. Br. at 17 ("The assumption underlying the Irrigators' appeal is that they are somehow entitled to prevent the Bureau, in complying with the Endangered Species Act or *its responsibilities to Klamath Basin Indian Tribes*, from reducing water supplies below those levels necessary to meet their own needs." [emphasis added]). In the court of appeals, the United States characterized the responsibility of Reclamation to manage Link River Dam in compliance with the Endangered Species Act as "wholly relevant to the issue at hand," and argued that "[a] similar point applies to the United States' trust responsibilities to the Klamath Basin Indian Tribes, who hold water rights with priority dates ranging from time immemorial to the nineteenth century." U.S. Br. at 54-55.

E. The relief sought by the amended counterclaim is broader than articulated by petitioners.

Petitioners also mischaracterize the scope of relief sought by the amended counterclaim. The amended counterclaim did not seek only a "declaration of petitioners' rights arising under the 1956 contract." Pet. at 9. Rather, the counterclaim also sought a declaration that PacifiCorp was not liable under the 1956 contract for carrying out the decisions of Reclamation in allocating water under the 1997 operations plan for the Klamath Project, which indisputably included allocation of water for instream uses of the intervenor Yurok Tribe.

REASONS FOR DENYING THE WRIT

Petitioners aim a surgeon's knife at the opinion of the court of appeals, asking this Court to exercise its summary disposition authority to excise three paragraphs of the opinion that confirm the settled authority — indeed the obligation — of Reclamation to operate its Klamath Project consistently with federal obligations to Indian tribes. Petitioners' hyper-technical dissection of the issues in this case cannot obscure the fundamental fact that the authority of Reclamation to so operate its Project is an inescapable element of any consideration of the issues raised by the complaint and amended counterclaim. It is telling that petitioners do not seek review of the court of appeals' decision that they are not third-party beneficiaries of the 1956 contract, that the 1956 contract can be amended without their consent, that Reclamation owns and has control over Link River Dam, that Reclamation must exercise that authority to comply with the Endangered Species Act, and that PacifiCorp is immune from suit by petitioners for implementing Reclamation's 1997 operations plan for the Klamath Project. Petitioners have offered no principled rationale for treating the court of appeals' disposition of the tribal water rights issues in isolation from these other issues. This omission is especially glaring in light of the fact that, as explained below, such issues are inextricably bound up with the other issues in the case.

Moreover, if these issues are as important as petitioners claim, summary disposition by this Court is not the appropriate means to resolve them. Rather, the proper means to obtain such review would be a petition for certiorari, with full briefing and argument upon the determination by this Court that the petition raises issues warranting this Court's

review. This Court should reject petitioners' unorthodox attempt to sever from this case those tribal water rights issues that have been litigated for over three years. The court of appeals properly addressed these issues and correctly applied the governing law. The petition for writ of certiorari should be denied.

I. The Authority and Obligation of the Bureau of Reclamation to Operate the Klamath Irrigation Project to Fulfill the United States' Trust Obligation to the Yurok Tribe Was Within the Scope of the Issues Raised by this Case, and the Court's Resolution of That Issue Does Not Depart from the Usual and Accepted Course of Judicial Proceedings.

It is undisputed that this litigation began as a challenge to Reclamation's 1997 interim Operations Plan for the Klamath Project. Petitioners brought suit because they objected to an amendment of the 1956 contract between the United States and PacifiCorp which implemented the water allocation decisions contained in the 1997 Operations Plan. Consistent with its legal obligations to satisfy senior tribal water rights, Reclamation in the 1997 Operations Plan specifically allocated water for Klamath River flows for the beneficial use of the Yurok Tribe as well as other tribes. As the Petitioners characterize it, the Plan "would first allocate fixed quantities of water to high instream Klamath River flows and high Upper Klamath Lake levels, and leave to the Klamath Project Irrigators [petitioners here] only the water left over after these requirements were met." Pet. at 6.

Petitioners thus brought this suit in part to protect themselves against Reclamation's decisions to fulfill its legal obligations to satisfy senior tribal water rights. Thus, while petitioners argued that they have rights to additional water

as third party beneficiaries of the 1956 contract, they also argued that PacifiCorp cannot carry out the 1997 Operations Plan if such implementation resulted in less water for the petitioners.

Petitioners' arguments in this litigation have been entirely consistent with that objective. Petitioners have contended throughout that their rights under the 1956 contract meant that Reclamation had no legal authority to order PacifiCorp to operate Link River Dam to give a higher priority to any use other than irrigation. This argument directly implicates tribal water rights in much the same way Reclamation's duties under the Endangered Species Act are implicated.[1]

Thus, a key issue in this case is the authority of Reclamation to operate Link River Dam in a manner to satisfy federal legal responsibilities, such as the Endangered Species Act and the United States' trust obligations to the Klamath Basin Tribes. The Yurok Tribe, as intervenor on the side of the federal defendants and PacifiCorp, maintained at every stage of this case that the duties of Reclamation to operate Link River Dam included the obligation to satisfy tribal water rights associated with reserved fishing rights, pursuant to federal obligations under the settled doctrine of the trust responsibility for Indian resources. *See United States v.*

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1. It is noteworthy that petitioners have not sought review of the court of appeals ruling that Reclamation must exercise its authority over Link River Dam in compliance with its legal responsibilities under the Endangered Species Act. For purposes of Reclamation's duties to operate Link River Dam, there is no principled distinction between its ESA responsibilities and its responsibilities to satisfy tribal water rights pursuant to the federal trust obligation.

Adair, 723 F.2d 1394, 1408-11 (9th Cir. 1983). The district court agreed with this contention, and the court of appeals affirmed the correctness of the scope of Reclamation's duty, both in the original panel decision and in the amended opinion on rehearing. Pet. App. at 12a-13a, 2a. It is a distortion of the record to suggest — now that petitioners' arguments in this regard have been thoroughly considered and rejected — that this issue was not properly raised.

A review of the record shows that the issue of Reclamation's authority to satisfy tribal water rights was not only raised, it was vigorously contested and litigated throughout this case. In a number of ways, petitioners' complaint directly implicated Reclamation's authority to operate the Project to comply with tribal water rights. The complaint alleged that Reclamation has determined to operate the project for "maintenance of specific flows in Klamath River and water surface elevations in Upper Klamath Lake," a reference to Reclamation's decision in the 1997 Operations Plan to comply with tribal instream flow and Lake level demands. ER 13. The complaint further alleged that such determinations would adversely affect the quantity of water available for irrigation. It is disingenuous of petitioners to have demanded that water be reallocated away from those River and Lake needs, and now allege that the courts have erred in considering those original allocations required by federal law for tribal needs.

The dismissal of petitioners' claims without prejudice, whether voluntarily or by order of the district court, did not change the nature of the case or the scope of the issues raised. The amended counterclaim alleged that Reclamation had directed PacifiCorp to operate Link River Dam in a manner that ensures that water is made available "to meet the trust

responsibility of the Secretary of the Interior to federally-recognized Indian Tribes within the Klamath Basin." ER 99. To protect itself against the consequences of an operations plan that may provide less water than the irrigators had received the year before, PacifiCorp sought in the amended counterclaim a declaration that PacifiCorp was not liable to the irrigators "under the [1956] Contract for implementing Federal Defendant's operations plans for the Klamath Reclamation Project." ER 584. Because the 1997 plan indisputably allocated water for instream uses of the Yurok Tribe, the amended counterclaim raised the issue of the existence of tribal water rights and the authority of Reclamation to operate the Project consistently with such rights.

Upon filing of PacifiCorp's counterclaim, the Tribe again intervened to protect its interests in water and fish in the Klamath River. SER 300. Petitioners did not oppose the Yurok Tribe's intervention in the counterclaim, which they conceded raised the identical issues petitioners sought to have resolved in their first cause of action relating to their asserted rights under the 1956 contract. SER 270. In fact, they invited the participation of the Yurok Tribe as intervenor:

> Here, PacifiCorp's counterclaim is directed against plaintiffs [petitioners] only. It may be appropriate, and plaintiffs have no objection, if as a condition of the dismissal of plaintiffs' first cause of action, the federal defendants and intervenors are permitted to join as parties or intervenors with respect to the counterclaim.

Plaintiffs' Memorandum and Authorities in Support of Motion for Voluntary Dismissal Without Prejudice of

Plaintiffs' First Cause of Action at 5, SER 270. Having invited intervention, petitioners cannot now be heard to complain that the Yurok Tribe raised issues petitioners knew or should have known would be raised, and that the court of appeals resolved those issues.

II. The Court of Appeals' Decision Upholding the Bureau of Reclamation's Authority to Satisfy Federal Legal Obligations to Indian Tribes is Consistent with Existing Law of the Circuit and Does Not Depart from the Usual and Accepted Course of Judicial Proceedings.

Petitioners do not seek review of the conclusion of the court of appeals that Reclamation owns and has substantial control over Link River Dam. They argue instead that the court of appeals should not have reached the issue of whether that authority includes the responsibility to satisfy legal obligations to Indian tribes, primarily because this issue is a source of on-going disagreement between the United States and the State of Oregon. Although petitioners may disagree with the court's conclusion, nothing in the court's reasoning, treatment of applicable authority or conclusion calls for this Court's exercise of the extraordinary power of summary disposition. Petitioners do not explain, nor could they, how the court of appeals' reasoning and conclusion departs so far from the accepted course of judicial proceedings that summary disposition is warranted. Certainly the fact that there are disagreements between the federal government and the State of Oregon regarding the scope of Reclamation's authority, Pet. at 17-18, is not sufficient reason to strike the court of appeals' careful and considered determination of that issue. The court of appeals did nothing more than decide the issues presented to it.

The court of appeals' handling of this issue is fully consistent with governing law of the Ninth Circuit and the decisions of this Court. It has long been the law in the Ninth Circuit that federal agencies are obligated to operate their projects in a manner that complies with the priority of tribal water rights, even in the absence of a completed adjudication. *Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987). In that case, the court of appeals upheld the duty of the Bureau of Indian Affairs (BIA) to protect the prior and paramount fishing water rights of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, even though there was then pending a state-wide water rights adjudication in the State of Montana. 832 F.2d at 1130, 1132. The irrigators in that case challenged the BIA's determination of instream flow levels and pool levels for the Tribes' fishery within the Flathead Irrigation Project. The court rejected the argument that the federal agency's determination and enforcement of tribal water rights should await the outcome of the state adjudication. The court noted the trust duty of the BIA to "accord potentially superior tribal fishing rights the protection that federal law gives them against claims and considerations of junior appropriators." 832 F.2d at 1131-1132. *See also Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032, 106 S. Ct. 593 (1985) (district court is not required to dismiss suit involving fishing and water rights of Yakima Nation in favor of a state court action generally adjudicating water rights in the Yakima River Basin).

Petitioners also argue that this Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), should be interpreted as precluding

judicial and "presumably federal agenc[y]" determinations of water allocations until state water adjudications are completed. Pet. at 14-15. Petitioners ignore the point that the policy against federal court involvement in water rights issues is based on "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817. The Oregon general stream adjudication is in the early stages and is years away from any determination of claims and quantification of rights. This Court has expressly recognized that if "the federal suit is well enough along" its dismissal "would itself constitute a waste of judicial resources and [would be] an invitation to duplicative effort." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 569 (1983). That is precisely the case here. The court of appeals' consideration and resolution of tribal water rights does not violate any federal policy with regard to state water adjudications. The court of appeals' amended opinion adequately addressed the concerns petitioners raised on their petition for rehearing.

The court of appeals' decision in the case under review confirms these legal principles. It does not conflict with any decision of any other circuit court of appeals. Even if the issue were worthy of this Court's review, the court of appeals' decision does not in any manner depart from the usual and accepted course of judicial proceedings. The request for summary disposition should be denied.

III. The Court of Appeals' Affirmation of the Existence of Tribal Water Rights in the Klamath Basin Does Not Depart From the Usual and Accepted Course of Judicial Proceedings.

Petitioners repeat here an argument that was rejected by the district court, twice rejected by the decision panel in the court of appeals and not a single judge voted to rehear these issues en banc.

Petitioners' principal complaint is that the court of appeals erroneously interpreted the scope of *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). Even were petitioners correct (and they are not), the threshold question for this Court is whether an alleged error of this kind calls for an exercise of this Court's power of supervision. As Justice Stevens has emphasized, this Court's "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases. . . ." *Watt v. Alaska*, 451 U.S. 259, 275, n.5 (1981) (Justice Stevens concurring). Petitioners have not identified any way in which the court of appeals' decision conflicts with the decision of any other circuit or any decision of this Court. Nor have they shown that the issue decided by the court of appeals is not, but should be, settled by this Court.

The court of appeals' reliance on *Adair* does not warrant an exercise of this Court's supervisory power. In *Adair*, the court of appeals applied well-settled principles of federal reserved Indian water rights to determine "the ordering [of] priority among reserved water rights arising under federal law" in the Klamath Basin. 723 F.2d at 1406 (distinguishing the determination of reserved rights and their priority from quantification, which was left for state court adjudication).

The court of appeals ruled that in the Treaty of 1864, the Klamath Tribes reserved a sufficient quantity of water to support their fishing and hunting rights. 723 F.2d at 1409. Because such rights had been exercised in Oregon and California for "thousands of years" in an ancestral homeland encompassing "some 12 million acres," the court ruled that the reserved water right has a senior priority date of first use or "time immemorial." 723 F.2d at 1412, 1413. The *Adair* court's conclusion is fully applicable to all the tribes in the Klamath Basin:

> Thus, we are compelled to conclude that where, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use.

723 F.2d at 1414.

Although *Adair* focused on the water rights of the Klamath Tribes, the Ninth Circuit has followed and applied the principles of that decision in other cases, just as it did here. *See, e.g., Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987) (the significance of *Adair* is that "when the Tribe exercised aboriginal title and rights to fish on the lands and waters in question before the reservation was created, the priority date of the reserved water right for fishery purposes is time immemorial.").

The fact that the Yurok Tribe was not a party in *Adair* does not render erroneous the court of appeals' reliance on that case as the basis for declaring the rights of the Klamath Basin Tribes. The principles on which the *Adair* Court based its decision apply with equal force to the water rights of the Yurok Tribe. The court of appeals has recognized that the Yurok Tribe has used water in the Klamath River for aboriginal fishing purposes since before the arrival of Europeans and before the reservation was created in 1855. *See Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (The Yurok Indians exercised fishing and hunting rights "long before the white man came," and such rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed."); *Parravano v. Masten*, 70 F.3d 539, 542, 546 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996) (Yurok Tribe has used the Klamath River "for generations" for "traditional salmon fishing"). Based on the Yurok Tribe's ancient usage of the Klamath River and the purpose of the executive order creating the Yurok reservation, the Ninth Circuit in *Parravano* concluded that the Yurok Tribe has federally-protected fishing rights in the waters of the Klamath River. *Id.* at 546. Similar to the Klamath Tribes, the Yurok Tribe's reserved water right accompanies the fishing right derived from aboriginal usage and the executive order creating the reservation. *See, e.g., United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983) (Klamaths' reservation created to preserve the right to fish included a reserved water right in the Tribes); *Joint Board of Control of Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987) (treaty right to fish includes a water right sufficient to satisfy tribal fishing needs).

Petitioners assert that the Yurok Tribe does not have a ratified treaty with the United States as a purported basis for distinguishing *Adair* from the circumstances of the Yurok Tribe, whose Reservation was created by executive order. Pet. at 21, n.16. The Ninth Circuit in *Parravano* rejected that distinction in determining that the Yurok Tribe has a federally-reserved fishing right, and the same logic applies in the water rights context. It is the law of the Ninth Circuit that water rights established by executive order are entitled to the same legal protection as those rights established by treaty. 70 F.3d at 545. This Court has not distinguished between water rights established by executive order and those established by treaty. *See Arizona v. California*, 460 U.S. 605, 616 (1983) (rejecting Arizona's argument that "water rights could not be reserved by Executive Order"). Petitioners suggest no reason why this Court should do so for the first time in this case, much less without the benefit of briefing on a proper petition for writ of certiorari.

Petitioners' argument here rests largely on speculation about the effect of the court of appeals' decision on petitioners' asserted rights in other forums. Pet. at 22. The effect and interpretation of the decision are matters to be resolved at an appropriate time in an appropriate case. The fact that petitioners arguments have been rejected by the court of appeals and that the decision may adversely affect their rights are not sufficient reasons for this Court to exercise its supervisory power to correct departures from the "usual and accepted course of judicial proceedings."

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied and the request for an order vacating Section II.B.3 of the court of appeals' decision should be denied.

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No. 99-1723

In the Supreme Court of the United States

KLAMATH DRAINAGE DISTRICT, ET AL., PETITIONERS

v.

ROGER PATTERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' request that this Court should excise a portion of the court of appeals' opinion, leaving the judgment undisturbed, represents an appropriate exercise of this Court's certiorari jurisdiction.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals is reported at 191 F.3d 1115. The order of the court of appeals on denial of rehearing (Pet. App. 1a-2a) is reported at 203 F.3d 1175. The amended opinion of the court of appeals (Pet. App. 1a-13a) is reported at 204 F.3d 1206. The opinion of the district court (Pet. App. 14a-26a) is reported at 15 F. Supp. 2d 990.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1999. A petition for rehearing was denied on January 28, 2000 (Pet. App. 1a). The petition for a writ of certiorari was filed on April 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Bureau of Reclamation (Bureau or BOR), an agency within the Department of the Interior, is charged with the administration of the Klamath Project. Administration of the Klamath Project involves the management of water levels in, and the distribution of water from, Upper Klamath Lake in the State of Oregon. The lake level is managed, in part, by control of the Link River Dam, which is owned by the BOR and operated, pursuant to a 1956 contract with the Bureau, by a private utility, respondent PacifiCorp. Pet. App. 2a-3a, 15a.

In managing the Klamath Project, the Bureau must take account of a variety of competing concerns. Those include the need to protect fish and wildlife, including species listed as threatened or endangered under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*; the United States' obligations as trustee for resources held in trust for Indian Tribes; and the BOR's contractual commitments to provide water to irrigators for agricultural purposes. The BOR has initiated a process for developing a long-term operations plan for the Klamath Project. In the meantime, the Bureau intends to proceed on the basis of one-year interim plans. In 1997, the United States and PacifiCorp entered into a temporary modification of the 1956 contract. Under the modification, the Bureau took over responsibility for specifying operations of Link River Dam for the remainder of 1997 according to the Bureau's 1997 interim operations plan for the Klamath Project. Pet. App. 4a-5a, 16a-18a.

Irrigators' rights to water from the Klamath Project derive from individual repayment contracts with the Bureau. Those contracts typically include a provision

absolving the Bureau of liability if it is unable to provide the quantity of water anticipated under the contract as a result of "drought * * * or other causes." Pet. App. 16a. In *O'Neill* v. *United States*, 50 F.3d 677 (9th Cir.), cert. denied, 516 U.S. 1028 (1995), the court of appeals addressed the question whether shortages caused by BOR's compliance with statutory requirements—in that case, the ESA and the Central Valley Project Improvement Act—were covered by similar contractual language. See *id.* at 682-683. The court concluded that the pertinent contract provision "unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate." *Id.* at 689.

2. Although federal reserved water rights for an Indian Tribe derive from and are defined by federal law, the quantification of such reserved water rights may take place in the context of a general stream adjudication in state court, pursuant to the waiver of the United States' sovereign immunity in the McCarran Amendment, 43 U.S.C. 666. The State of Oregon has established a statutory procedure to determine the surface water rights of all claimants in the Klamath River Basin in Oregon. See *United States* v. *Oregon*, 44 F.3d 758, 764 (9th Cir. 1994), cert. denied, 516 U.S. 943 (1995). In *United States* v. *Oregon*, the court of appeals held that the waiver of federal sovereign immunity contained in the McCarran Amendment applies to the Oregon proceeding. 44 F.3d at 763-770.

3. Petitioners are irrigators and a non-profit association of irrigators. They filed suit in federal district court, arguing (*inter alia*) that they were third party beneficiaries of the 1956 contract between PacifiCorp and the United States, and that the 1997 modification

breached their rights under that contract. Pet. App. 5a, 18a. PacifiCorp filed a counterclaim for a declaratory judgment, asking the district court to declare that

> (1) [petitioners] are not third party beneficiaries to the 1956 contract with respect to irrigation water, and the contract creates no rights in [petitioners] to irrigation water; (2) the 1956 contract may be amended with regard to PacifiCorp's rights and obligations to operate Link River Dam without [petitioners'] consent; and, (3) PacifiCorp is not liable to [petitioners] under the 1956 contract for implementing [the BOR's] water allocation decisions for the Klamath Project.

Id. at 25a-26a.

After the district court granted BOR's motion for summary judgment on petitioners' claim under the National Environmental Policy Act of 1969 (NEPA), petitioners moved for voluntary dismissal without prejudice of their remaining claims. Pet. App. 18a-19a. The court subsequently granted motions filed by PacifiCorp and BOR for summary judgment on PacifiCorp's counterclaim. *Id.* at 19a-26a. The court acknowledged that "[t]he 1956 contract operates to [petitioners'] benefit by impounding irrigation water, and certainly was entered into with irrigators in mind." *Id.* at 24a. It held, however, that petitioners "are not parties to the contract and there is no manifestation of intent by the parties to provide to the many irrigators participating in the project the right to sue under the contract or veto proposed modifications to it." *Ibid.* The court stated, in that regard, that "[t]o allow [petitioners] to sue for a shortage under the 1956 contract, to which they are not parties, in the face of the hold harmless provision contained in their individual repayment con-

tracts, to which they are parties, would be inconsistent and is not supported by the record." *Id.* at 25a. The court therefore granted PacifiCorp's request for a declaratory judgment. See *id.* at 26a (stating that PacifiCorp's "requested declarations are hereby adopted").

4. The court of appeals affirmed. Pet. App. 1a-13a.

a. The court first held that petitioners were not intended third-party beneficiaries of the 1956 contract. Pet. App. 6a-10a. The court explained that the text of the contract does not reflect an express or implied intent to grant petitioners enforceable rights. *Id.* at 7a-9a. While acknowledging that "the Contract operates to [petitioners'] benefit by impounding irrigation water," *id.* at 9a, the court stated that "to allow [petitioners] intended third-party beneficiary status would open the door to all users receiving a benefit from the Project achieving similar status, a result not intended by the Contract," *id.* at 10a.

b. The court of appeals also addressed petitioners' contention that the district court had erred in granting PacifiCorp's counterclaim and adopting PacifiCorp's requested declarations. Pet. App. 10a-13a. The court of appeals upheld the rulings of the district court. It explained that the 1956 contract "makes clear that the United States retains overall authority over decisions on use of Project water," and that PacifiCorp was therefore entitled to "immunity from suit in implementing [BOR's] 1997 plan." *Id.* at 11a. The court also held that BOR, in administering the Klamath Project, is subject to obligations imposed by the ESA. *Id.* at 11a-12a.

Finally, the court addressed BOR's obligation, in managing the Klamath Project, to protect the water rights of Indian Tribes. The court stated that "[s]imilar to its duties under the ESA, the United States, as a

trustee for the Tribes, has a responsibility to protect their rights and resources." Pet. App. 12a. The court cited its prior decision in *United States* v. *Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984), for the propositions that "the Klamath Basin Tribes hold implied water rights to support hunting and fishing rights guaranteed by treaties," and that "water rights for the Klamath Basin Tribes carry a priority date of time immemorial." Pet. App. 12a (internal quotation marks omitted).[1] The court concluded that "[b]ecause [BOR] maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the [petitioners]." *Id.* at 12a-13a.

c. Petitioners filed a Petition for Rehearing or Modification, with Suggestion for Rehearing En Banc. The court of appeals denied rehearing and rehearing en banc, but it amended its opinion by adding a new footnote 3. See Pet. App. 2a, 13a n.3. Footnote 3 recognizes that the ongoing Oregon state proceeding (see p. 3, *supra*) "is a comprehensive water rights adjudication contemplated by the McCarran Amendment, 43 U.S.C. § 666, and questions of relative amounts and priorities, at least within the State of Oregon, will be decided there." Pet. App. 2a, 13a n.3. The court of appeals explained that its "decision in this case and that of [the] district court relate only to questions involving the Bureau's operation and management of the Project, not to the relative rights of others not before the court to the use of the waters of the Basin." *Ibid.*

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[1] The term "Klamath Basin Tribes" includes the Klamath, Yurok, and Hoopa Valley Tribes. Pet. App. 4a.

ARGUMENT

Although petitioners at one point characterize their requested disposition as a "summary reversal" (Pet. 25), they do not in fact seek alteration of the court of appeals' judgment. Rather, they ask this Court to excise a portion (Section II.B.3, see Pet. App. 12a-13a) of the court of appeals' opinion, while leaving the court's judgment intact. See Pet. 3-4, 26. We are aware of no case in which this Court has granted such a request, and petitioners' proposed disposition is inappropriate here. The petition for a writ of certiorari should be denied.

1. This Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); accord, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 & n.8 (1984). It is not clear that petitioners' request for revision of the court of appeals' opinion, unaccompanied by any challenge to the underlying judgment, presents this Court with an Article III "Case[]" or "Controvers[y]." But even assuming that constitutional requirements are met, the petition does not satisfy the criteria for invoking this Court's discretionary jurisdiction. Petitioners do not contend that the legal pronouncements contained in Section II.B.3 of the court of appeals' opinion conflict with decisions in other circuits or otherwise warrant this Court's plenary review. They argue instead that the court of appeals should not have addressed questions concerning tribal water rights at all because those questions were not sufficiently related to the issues actually contested by the parties. There is no reason, however, for this Court to devote its limited resources to the identification and

excision of purportedly objectionable language in lower court opinions.

Petitioners contend (Pet. 22-23) that there is "a high risk that the Ninth Circuit's ruling on a question involving federally-based tribal water rights will be viewed as binding in the current [Oregon] state stream adjudication, or in subsequent litigation involving the downstream portion of the river in California." That prediction, however, is inconsistent with petitioners' basic contention that the court of appeals ought not to have addressed the issue of tribal water rights. "Under the doctrine of collateral estoppel, * * * the judgment in the prior suit precludes relitigation of issues *actually litigated and necessary to the outcome of the first action.*" *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979) (emphasis added). If (as petitioners contend) the questions discussed in Section II.B.3 of the court of appeals' opinion were neither litigated by the parties nor necessary to the judgment, the court's opinion will not be entitled to preclusive effect in a subsequent action. Moreover, the court of appeals on denial of rehearing expressly disavowed any intent to bind the adjudication of water rights in Oregon's ongoing proceeding. The court of appeals recognized that the pending Oregon proceeding "is a comprehensive water rights adjudication contemplated by the McCarran Amendment, 43 U.S.C. § 666, and questions of relative amounts and priorities, at least within the State of Oregon, will be decided there." Pet. App. 2a, 13a n.3.

2. The question whether BOR must protect tribal trust resources in operating the Klamath Project—while not the primary focus of contention in the court of appeals—is substantially related to issues that were the subject of dispute. In formulating the 1997 interim plan

for the Klamath Project, BOR took into account its obligation to protect the water rights of the Klamath Basin Tribes. See Pet. App. 17a-18a. The district court entered a declaratory judgment holding (*inter alia*) that "PacifiCorp is not liable to [petitioners] under the 1956 contract for implementing [BOR's] water allocation decisions for the Klamath Project." *Id.* at 26a.

On appeal, petitioners contended that

> [w]ith respect to alleged "direction" to PacifiCorp to comply with purported tribal trust obligations of federal agencies, * * * [t]he allegation itself poses an obvious question: why is PacifiCorp responsible for meeting *Interior's* obligations? Again, the fundamental truths are that PacifiCorp is not [BOR] and [BOR] does not operate the dam. PacifiCorp is a private corporation, with both rights and obligations under a contract. [BOR] reserved no rights under the contract to direct the release of water for any other purpose than to protect water for irrigation in the Project.

Pet. C.A. Br. 57. Thus, petitioners argued that under the 1956 contract, (a) PacifiCorp rather than BOR was charged with operation of the Link River Dam, and (b) the Bureau was not authorized to direct PacifiCorp to fulfill any responsibilities that the government might have as trustee for tribal property. The court of appeals squarely rejected the first proposition, holding that "the [1956] Contract makes clear that the United States retains overall authority over decisions on use of Project water." Pet. App. 11a. It then went on to state that "[b]ecause [BOR] maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights." *Id.* at 12a. While that statement may not have been strictly necessary to

the court of appeals' disposition of the case, it was closely related to the issues that had been the focus of the parties' dispute. There is consequently no basis for petitioners' contention that the court of appeals has "departed from the accepted and usual course of judicial proceedings." Pet. 16 (quoting Sup. Ct. R. 10(a)).

3. In this Court, petitioners do not challenge the court of appeals' holding that BOR rather than PacifiCorp has ultimate responsibility for the operation of the Link River Dam. Given that holding, the court of appeals correctly determined that BOR's administration of the Klamath Project must take account of tribal water rights. Petitioners contend that the court of appeals' analysis "is highly disruptive to any predictable scheme for fairly regulating water rights in accordance with their legal priorities," and that it "raises a substantial federalism question, between [BOR's] authority and that of the states." Pet. 17. That characterization misconceives the relationship between the pending state adjudication and BOR's operations plan for the Klamath Project.

The Bureau recognizes, and is currently participating in, the State of Oregon's Klamath Basin Adjudication. At some point, the State will quantify the rights of all claimants to water in the Klamath Basin in Oregon, and the Bureau will revise its operations as necessary to accommodate those determinations. While that adjudication is pending, however, the Bureau must distribute water in a manner consistent with its contractual, statutory, and trust responsibilities. And until the relative entitlements of the various claimants have been finally determined in the state proceeding, BOR must necessarily decide how its various duties are appropriately reconciled. The Bureau's acceptance of that responsibility does not amount to a final "adjudication"

by BOR of competing claims, nor does it usurp the role of the Oregon tribunals.

Carried to its logical conclusion, petitioners' argument would suggest that the Bureau is foreclosed from delivering water to anyone--including petitioners themselves—until the Oregon adjudication is completed. After all, not even petitioners have adjudicated water rights in the Klamath Basin. If the Bureau is unable to act on the basis of its own best judgment pending the resolution of state administrative and judicial proceedings, its distribution of water throughout the West will likely be stymied for a prolonged period of time. Nothing in this Court's water rights decisions, or in general principles of federalism, supports that result.

4. The court of appeals cited its prior decision in *United States* v. *Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984), for the propositions that "the Klamath Basin Tribes hold implied water rights to support hunting and fishing rights guaranteed by treaties," and that the "water rights for the Klamath Basin Tribes carry a priority date of time immemorial." Pet. App. 12a (internal quotation marks omitted). We agree with petitioners (see Pet. 21-22) that the court's description of *Adair* is somewhat imprecise. That imprecision is unlikely to have significant practical consequences, however, and it does not warrant correction by this Court.

Adair discussed the water rights of the Klamath Tribes in Oregon (see 723 F.2d at 1397-1398, 1408-1415), as distinct from the Klamath Basin Tribes (which include the Yurok and Hoopa Valley Tribes in California, see note 1, *supra*). The court of appeals' parenthetical summary of *Adair*, which describes the case as "holding that the Klamath Basin Tribes hold implied water

rights," Pet. App. 12a, is therefore technically inaccurate. The *reasoning* of *Adair* strongly suggests, however, that the Yurok and Hoopa Valley Tribes, like the Klamath Tribes, hold implied water rights. The court in *Adair* held that the hunting and fishing rights reserved to the Klamath Tribes by an 1864 treaty carry with them an implied reservation of water rights sufficient to support exercise of treaty hunting and fishing rights. 723 F.2d at 1408-1415. The Ninth Circuit has held that the Yurok and Hoopa Valley Tribes have fishing rights in the Klamath Basin. See *Parravano* v. *Babbitt*, 70 F.3d 539, 544-546 (1995), cert. denied, 518 U.S. 1016 (1996). Although no court has addressed the question whether the Yurok and Hoopa Valley Tribes possess water rights, the reasoning of *Adair* (and other precedents of this Court and the Ninth Circuit) indicates that those Tribes would have instream flow rights sufficient to support their fishing rights.

The court of appeals also cited *Adair* for the proposition that "water rights for the Klamath Basin Tribes 'carry a priority date of time immemorial.'" Pet. App. 12a (quoting *Adair*, 723 F.2d at 1414). As we explain above, the decision in *Adair* does not directly address the water rights of the Yurok and Hoopa Valley Tribes. And because the water rights of those Tribes are derived from different provisions of law than are the rights of the Klamath Tribes, the priority dates of the various Tribes are not necessarily the same.[2] The

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[2] A memorandum issued by the Regional Solicitor of the Department of the Interior states that "[t]he executive orders setting aside what are now the Yurok and Hoopa Valley Reservations also reserved rights to an instream flow of water sufficient to protect the Tribes' rights to take fish within their reservations." Pet. App. 36a. The memorandum further states

court of appeals' imprecision is unlikely to have meaningful practical consequences, however, particularly in light of its explicit recognition (see Pet. App. 2a, 13a n.3) that "questions of relative amounts and priorities, at least within the State of Oregon, will be decided" in the pending state adjudication.

CONCLUSION

The petition for a writ of certiorari should be denied.

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that "[t]he priority date[s] of the Yurok and Hoopa water rights are at least as early as 1891, and may be earlier." *Id.* at 37a.

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No. 99-1723

IN THE
Supreme Court of the United States

KLAMATH DRAINAGE DISTRICT;
KLAMATH WATER USERS PROTECTIVE ASSOCIATION;
SAM HENZEL; HENZEL PROPERTIES, LTD.

Petitioners,

v.

ROGER PATTERSON; KARL E. WIRKUS; ELUID MARTINEZ;
PATRICIA BENEKE; BRUCE BABBITT; UNITED STATES
BUREAU OF RECLAMATION; UNITED STATES OF AMERICA;
PACIFICORP; YUROK TRIBE

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MISCELLANEOUS

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The Petition for Certiorari demonstrated that the Ninth Circuit went far beyond the contract dispute before it to decide important, unlitigated questions of federal agency authority and contested water rights. The decision below arose from litigation between PacifiCorp, the operator of a federally-owned dam on the Klamath River in Oregon, and Petitioner irrigators who include longstanding users of water from the Klamath River Project, of which the dam is a part. As presented to and resolved by the district court on PacifiCorp's counterclaim for declaratory relief against Petitioners, the sole issue was whether Petitioners have rights against PacifiCorp, as third party beneficiaries under the 1956 dam operation contract. The district court held that they had no such rights *under the contract*, and that Petitioners thus had no basis to object to an amendment of that contract or to sue PacifiCorp *under the 1956 contract* for actions taken by it in managing the Klamath Project.

1. PacifiCorp, Petitioners and the United States all framed the issue before the Ninth Circuit as limited to the question of Petitioners' rights *under the 1956 contract*. (Pet. 7-9). The circuit court first acknowledged that limited focus of the case (Pet. App. 2a), and ruled unambiguously that Petitioners had no rights under the 1956 contract. (Pet. App. 9a-10a). The presence or absence of asserted tribal water rights has no bearing on the resolution of that question. Having resolved the only matter pled or litigated, the court below nonetheless proceeded, in a section headed "3. Indian Water Rights," to endorse the conduct of the Bureau of Reclamation in allocating water from the Project to tribal claims of the Yurok and Hoopa Tribes. (*Id.* at 12a-13a) as well as the Klamath Tribes in Oregon.

In the section at issue, the Ninth Circuit announced definitively—but incorrectly—that it had previously found that the water rights of the Yuroks and other Klamath Basin Tribes "carry a priority date of time immemorial." (Pet. App. 12a).

Although it did not assert that those supposed time-immemorial rights had ever been quantified, the court further announced, without analysis or discussion, that "[b]ecause Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators." (Pet. App. 12a-13a).

Petitioners ask this Court to summarily vacate these extraneous pronouncements by the Ninth Circuit, on the grounds that they exceed the authority of an Article III Court by opining on important questions of government authority and tribal rights in a case where those rights were not in issue, and do so in a manner certain to sow "legal confusion." *California v. United States*, 438 U.S. 645, 669 (1978).

The appropriateness of this relief is further demonstrated by the oppositions to certiorari that have been filed by the United States and by the Yurok Tribe, and by the fact that PacifiCorp, for whom judgment was entered below, has seen no need even to enter an appearance in this Court.

a. The United States concedes that the Ninth Circuit's recognition of Bureau of Reclamation responsibility to allocate water based on asserted water rights of the Tribes "may not have been strictly necessary" to the disposition of the case. (U.S. Opp. 9-10) But it seeks to make a virtue of the extraneous character of the challenged ruling, by pointing out that its deletion would have no effect on the judgment of the appellate court, and thus arguing that no action is required of this Court. (*Id.* at. 8). Petitioners certainly agree that the contract interpretation issue posed by PacifiCorp's counter-claim presented no occasion for the court below to opine on the matters addressed in Section 3, and that the summary relief Petitioners request could not conceivably effect the judgment in favor of PacifiCorp on the matter in issue.

Petitioners submit, however, that the Ninth Circuit's purported resolution of two issues of great sensitivity and importance that were neither presented nor litigated before it is the principal justification for the exercise of this Court's supervisory powers under Supreme Court Rule 10(a). The Rule recognizes as reasons for the grant of certiorari the fact that an appellate court "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." These powers are inherently flexible and adaptable to the circumstances of each case. *E.g., Thermtrom Products v. Hermansdorfer*, 423 U.S. 336 (1976) (supervisory powers invoked to rule that removal may not be denied due to heavy caseload), *overruled on other grounds, Quackenbush v. Allstate Ins. Co.* 517 U.S. 706 (1996); *Thiel v. Southern Pac Co.,* 328 U.S. 217, 225 (1946) (supervisory powers invoked to regulate manner by which jury panels are constituted).

Here, the Ninth Circuit's unsolicited musings can be vacated summarily, Rule 16(1), with no effect on the judgment and only a modest expenditure of this Court's time and energy. Such action would eliminate the risk posed by the decision below as a derelict in the field of water law. That risk stems from the probability that unconditional assertions of federal legal rights and powers, by a panel of a United States Court of Appeals, are likely to be taken seriously.

b. As the opposition of the Yurok Tribe illustrates, there will be no shortage of interested parties ready to urge, on whatever grounds, that the court below acted properly in deciding the matters raised in Section 3. The Yuroks contend that the issue of Reclamation authority was raised in Petitioners' initial complaint, and further, absurdly, that the dismissal of that complaint "did not change the nature of the case or the scope of the issues raised." (Yurok Op. 9). The Tribe further contends that the same issue was raised in

PacifiCorp's counterclaim. (*Id.* at 9-10). In this it is simply wrong, as was amply demonstrated in the Petition. (Pet. 7).

Finally, the Yurok's claim that since the Petitioners did not oppose the Yurok's intervention in the counterclaim, the "petitioners cannot now be heard to complain that the Yurok Tribe raised issues petitioners knew or should have known would be raised." (Yurok Opp. 11). This argument is equally meritless. Although the Yuroks were allowed to intervene in the action, they did not file a counterclaim or cross claim requesting any relief or seeking a declaration as to the limits of Reclamation's authority. It is no answer to the Petitioners' argument to say that we "should have known" this issue would be raised. (*Id.*). Here again, it is black letter law that an intervener, simply by filing briefs containing arguments, "cannot change the issues framed between the original parties." 7C Wright & Miller, *Federal Practice and Procedure* § 1920 (2d 1986) (*quoting Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141 (D. Cal. 1954)).

2. With regard to its statement that the asserted water rights of the Yuroks and Hoopas run from time immemorial, the Ninth Circuit clearly rested on a misreading of the *Adair* decision. The United States so concedes, and expressly acknowledges that *Adair* dealt only with the rights of the Klamath Tribes of Oregon, and not with the Klamath Basin Tribes, which include the Yuroks and Hoopas. (U.S. Opp. 11). The United States also acknowledges that Interior's Regional Solicitor has not even asserted Hoopa and Yurok water rights as found by the court below, with a priority date of time immemorial, but only with priority dates "at least as early as 1891"—a critical difference in view of the claims of many irrigators to rights arising before 1891. (*Id.* at 12-13 n.2).

The Yurok's brief also acknowledges that *Adair* did not address the rights of the Hoopa and Yurok Tribes, but nonetheless asserts that its reasoning applies "with equal force

to the water rights of the Yurok Tribe." (Yurok Opp. 15-16). It makes this claim notwithstanding the distinction between the priority dates of Indian water rights *conferred upon* the tribe by statute or executive order, and running from that date—as claimed by the Yurok—and of rights *retained by* the Tribe in a treaty, which by definition pre-date the treaty—as in *Adair*. (*See* Pet. 21-22 n.16). It is no answer to say, as do the Yuroks, that water rights arising in either manner "are entitled to the same legal protection." (Yurok Opp. 17). The critical question is the priority date that the rights are assigned within the prior appropriation system, which clearly is affected by whether they are created by treaty or executive order.

3. With regard to the authority of Reclamation to allocate water on an interim basis to unadjudicated tribal claims, this issue is complex and difficult, falling at the juncture of several sensitive legal areas, and should not be off-handedly resolved in a case where the question is not presented. The United States does not dispute that the issue is novel and previously undecided. Instead, the United States points out that Reclamation's allocation decisions are made on an interim basis only, and do not usurp the role of the Oregon judicial stream adjudication. (U.S. Opp. 10). It further contends that Reclamation has no practical alternative but to use its own best judgment pending the resolution of state proceedings to distribute water from federal projects in the West. (*Id.* at 11).

However, the claimed necessity referenced by the Government is met by a larger list of equally compelling issues and problems that arise if such authority is in fact recognized. Some of these issues are highlighted in the Petition, at 20 n.15 and neither the United States nor the Yuroks has addressed any of them. Most of these concerns have no answers that are wholly satisfactory, and among the most serious stem from the fact that Reclamation is only able to reallocate water from those users, like Petitioners, who rely on water coming directly from the Klamath Project. Thus, when Reclamation uses its

"best judgment" to reallocate water to the tribes, junior users who are free from Reclamation's control may continue to take water, while the Petitioners must answer the call of the tribes.

It is no answer that Reclamation's reallocation decisions apply only in the interim years, pending resolution of the Oregon stream adjudication. All water allocations are passing events whose effects may be unimportant in abundant years and devastating in dry ones. The power of Reclamation to allocate water away from one set of users, while leaving others unrestricted, is obviously highly significant during the years or decades in which it is exercised. (Of course, in this case, the Yurok and Hoopa Tribes reside in California and are not even parties to the Oregon adjudication.)

It may or may not, at the end of the day, be determined, either judicially or legislatively, that Reclamation should use "its best judgment" to distribute water pending state adjudication. If so, it may or may not be determined that certain procedural safeguards attend that process or that judicial review of a particular type must be available. But such conclusions are certainly not obvious, and raise numerous important questions requiring careful consideration. Here, the issue of that power has been decided *ipse dixit*, in a case where it was not presented for decision, let alone litigated by the parties or others with an interest in the outcome of the question.

4. In seeking summary relief from this Court, Petitioners do not in any way suggest, as the Yuroks contend (Yurok Opp. 12-13), that the abstention doctrine enunciated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), inflexibly precludes any federal determination of water allocation pending state adjudication. (Pet. 14-15). Instead, the Petition explains that "[w]hile *Colorado River* did not announce an inflexible rule against federal court involvement in determining water rights issues, it recognized a 'clear federal policy' rooted in the McCarran Amendment, of

avoiding 'piecemeal adjudication of water rights.'" (*Id.* (quoting 424 U.S. at 819)). This policy is a counsel of restraint to be weighed in the balance against other factors that may press for immediate resolution. Thus, a conceivable alternative that is preferable in several respects to Reclamation's exercise of the asserted allocation power — if it believes that tribal rights exist that require protection — would be a separate lawsuit brought by the Government to determine and protect the rights of the tribes and the Klamath Project irrigators against junior diversions. *Nevada v. United States*, 463 U.S. 110, 113 (1983).

Nor is there existing case law, as the Yuroks—but not the United States—suggest, making the question of Reclamation's allocation authority as recognized by the Ninth Circuit a foregone conclusion under the test articulated by *Colorado River*. The Yuroks rely upon *Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987), as establishing the power and duty of federal agencies to allocate water based on their own assessment of tribal water claims. (Yurok Opp. 12) But the issue of agency authority was never challenged or discussed by the court. Even if it had been, in that case the Bureau of Indian Affairs acted pursuant to an express statutory mandate to Interior to regulate use of irrigation waters on the reservation. 832 F.2d at 1131; 25 U.S.C. § 381. In addition to that statutory directive, there was a specific regulation, which delegated authority to an "Officer-in-Charge" responsible for exercising his judgment in the proper operation of the project. 25 CFR § 171.1(c); *Joint Bd. of Control of the Flathead, Mission and Jocko Irr. Dist. v. United States* 646 F. Supp. 410 (D.Mont. 1986). Given that express grant of regulatory power, it does not at all follow that the recognition of such authority in the BIA where reservation water is concerned would mean that Reclamation necessarily possesses a parallel allocation authority over water flowing through a federal dam. The

special problems relating to Reclamation's inability to control all users, (*see* Pet. 20 n.15), argue to the contrary.

5. The disruptive effects of the language in issue stem from the unambiguous nature of the Ninth Circuit's assertions about Reclamation's allocation authority and responsibility, and about the adjudicated existence and priority of tribal water rights, and the court's clear error on the last point. Such statements by a federal appellate court on matters governed by federal law are likely to carry substantial weight.

There is no need to imagine when or how parties will invoke the authority of this gratuitous language in support of the propositions that it asserts. Obviously, the Tribe that actively solicited and is directly benefitted by the language can be expected to view it as dispositive of these issues, and the Yurok brief does not disappoint in this regard. (*E.g.*, Yurok Opp. at 7-11).

At the same time, even as it is imploring this Court to deny certiorari on the ground that the challenged language is dicta, the United States has recently cited this section of the Ninth Circuit's opinion as support for the very proposition that it here claims the case does not stand for. *See Pacific Coast Fed. of Fisherman's Ass'ns v. Bureau of Reclamation*, No. 00-1955 SBA (N.D. Cal. (Oakland Div.)) Federal Def.'s Opp. to Plts.' Mot. for Prelim. Inj. at 6 (June 12, 2000). In that case, Reclamation is contesting a motion for preliminary injunction brought by environmental groups who claim they have been adversely effected by the way that the Klamath Project is being operated. In defending the reallocation decision embodied in the project operation plan, Reclamation argued to the district court that "'[t]he Ninth Circuit recently affirmed that [Reclamation] must operate consistent with . . . Indian water rights . . .' *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000)."

The potential disruptive effects of the Ninth's Circuit's misstatement on the reach of its opinion in *Adair* are no less serious. The United States acknowledges to this Court the opinion's "imprecision," but inexplicably argues that this error is "unlikely to have meaningful, practical consequences." (U.S. Opp.13). But this attempt to minimize the impact of this error is also belied by its submission to the Northern District of California in the suit noted above. *Pacific Coast Fed. of Fisherman's Ass'ns v. Bureau of Reclamation, supra.* In the same sentence in which it claims that the issue of Reclamation's authority has been settled, the United States notes that the decision below "affirmed . . . that the Indian [Yurok and Hoopa] water rights are *senior* to those held by the United States for the Project." Fed. Def.'s Opp. to Plt.'s Motion, *supra.* (emphasis added) (citing *Klamath Water Users Protective Ass'n. v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000)).

Never does the United States advise that court, as it urges here, that the language in issue is mere dicta.

6. The sensitive character of the issues raised in this Petition has been accentuated by the recent petition for certiorari filed by the United States in *United States Dep't of Interior v. Klamath Water Users Protective Ass'n, petition for cert. filled*, 68 U.S.L.W. 3741 (U.S. May 22, 2000) (No. 99-1871). That case presents the question whether information provided to the Government, and specifically the Bureau of Reclamation, by Indian tribes in connection with tribal water claims—indeed the very tribal claims at issue in this case—is protected against public disclosure under Exemption 5 of the Freedom of Information Act, concerning internal agency deliberations. 5 U.S.C. § 552(b)(5). The Ninth Circuit there rejected the Government's attempt to avoid public disclosure. If certiorari is granted and the United States prevails in that case, then the power of Reclamation to make water allocation decisions based on unadjudicated tribal claims which was

recognized by the court below can be exercised under cover of secrecy, with tribal submissions in support of their claims free from any scrutiny by the public or by competing water claimants. Such a procedure is a far cry from the due process granted in a *judicial* adjudication of rights, and would put the power recognized below in a new light. Reclamation would thus be authorized to allocate water rights by a process in which *ex parte* agency contacts by Tribal claimants only would be permitted.

If, and only if, this Court declines on the present record to act summarily, as Petitioners request, to strike the offending language of Section 3 of the Ninth Circuit's opinion, Petitioners urge in the alternative that the Court hold this Petition on its docket pending the resolution of the United States's petition in case no. 99-1871, for further consideration at that time.

CONCLUSION

Petitioners pray that the petition for certiorari be granted, and an order issued directing that Section II.B.3 of the decision below be vacated.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 99-1723

IN THE
Supreme Court of the United States

KLAMATH DRAINAGE DISTRICT;
KLAMATH WATER USERS PROTECTIVE ASSOCIATION;
SAM HENZEL; HENZEL PROPERTIES, LTD.

Petitioners,

v.

ROGER PATTERSON; KARL E. WIRKUS; ELUID MARTINEZ;
PATRICIA BENEKE; BRUCE BABBITT; UNITED STATES
BUREAU OF RECLAMATION; UNITED STATES OF AMERICA;
PACIFICORP; YUROK TRIBE

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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The Petition for Certiorari in this matter demonstrates that the Ninth Circuit went beyond the issues in controversy before it to expound upon the Bureau of Reclamation's authority and duties in allocating water from its water projects. In particular, the court reasoned that because the United States is in a trust relationship with the Tribes, the Bureau of Reclamation must exercise its power to allocate water from federal water projects so as to "protect [Tribal] rights" to water (Pet. App. 12a), even where those rights have never before been determined.

Based on a mistaken reading of its own prior decision in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), the court concluded that the Klamath Basin tribes, including the Yurok and Hoopa, have water rights which "take precedence over any alleged rights of the Irrigators," and thus that Reclamation "has a responsibility to divert water . . . needed to fulfill the Tribes' rights." (Pet. App. 12a-13a)

In its opposition, the United States conceded that the Ninth Circuit's decision of these issues "may not have been strictly necessary," but argues that relief is unnecessary because the discussion "was closely related" to the subject matter of the dispute (U.S. Opp. at 9-10) and is unlikely to mislead other courts. (*Id.* at 8.) Petitioners argue, to the contrary, that the Ninth Circuit's unprecedented and unqualified assertion of Reclamation's authority and obligation to allocate water based on its own assessment of unadjudicated tribal water rights is certain to sow legal confusion. (Reply at 2.)

The United States further acknowledges that the court below misunderstood its own *Adair* decision concerning Tribal water rights (U.S. Opp. at 11-12), but argues that the error is "unlikely to have meaningful, practical consequences." (*Id.* at 13.)

This supplemental brief is submitted to make the Court aware of a recent order by the United States District Court for the District of Oregon in which Section II.B.3 of the decision

below is cited as authority on precisely the issues on which it is challenged by Petitioners. In *Langell Valley Irrigation District v. Babbit,* (No. 00-6265 HO) (D. Ore. Aug. 31, 2000), irrigators in a region of the Klamath Project challenged a Bureau of Reclamation plan to release water from Clear Lake into the Lost River, thus facilitating increase in the downstream flows in the Klamath River, based in part on water rights claims of the downstream Tribes whose unadjudicated claims are addressed in Section II.B.3. (*See* Pet. App. 27a) The United States, in *Langell*, relied expressly on its trust obligations to honor these tribal water rights claims (App. 4a), and the trial court justified its decision upholding the Government's position in part on the ruling of the court below that "the government must direct operations of the Link River Dam consistent with its . . . tribal trust obligations. *Patterson*, 204 F.3d at 1213-14 [Pet. App. 11a-13a]." (App. 10a)

The *Langell* decision thus begins the process that can be expected if Section II.B.3 is allowed to stand. The gratuitous portion of the decision below is invoked to support determinations that are part of the holding of other cases, and thus gain a momentum that will likely foreclose a genuine day in court on the important and difficult questions at hand. This Court's summary reversal authority, Rule 16.1, is well-suited to addressing such fundamental abuses of judicial power.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LANGELL VALLEY IRRIGATION DISTRICT, a political subdivision of the State of Oregon, HORSEFLY IRRIGATION DISTRICT, a political subdivision of the State of Oregon, as trustees for their individual water righted patrons, and MARIO GIORDANO, an individual,	
Plaintiffs,	Case No. 00-6265-HO
v.	ORDER
BRUCE BABBITT, in his official capacity Secretary, United States Department of the Interior; LESTER SNOW, in his official capacity as Regional Director, Mid-Pacific Region, United States Bureau of Reclamation; and KARL WIRKUS, in his official capacity as Manager, Klamath Project, United States Bureau of Reclamation,	
Defendants.	

Plaintiffs Langell Valley Irrigation District (LVID), Horsefly Irrigation District (HID), and Mario Giordano, bring this action seeking to enjoin defendants, the Department of the Interior, the Bureau of Reclamation, and the manager of the Klamath Project, from continuing to implement a plan at Clear Lake and

Gerber reservoirs involving the release of volumes of water at increased rates to the Lost River. The government is attempting to release stored water to the Lost River and its tributaries for use on lands in the Tule Lake area in order to compensate for reduced irrigation deliveries from Upper Klamath Lake.

Magistrate Judge Coffin heard argument regarding the TRO application on Friday, August 25, 2000, and granted the TRO in part. Judge Coffin specifically allowed the government to commence its scheduled release of water from Clear Lake up to the level of 100 cubic feet per second (c.f.s.), but enjoined the government from increasing the flow of the release until the motion for a preliminary injunction could be heard. The government is scheduled to increase the flow to 200 c.f.s. beginning Tuesday. The government has responded to the motion in writing, so the motion can be heard as one for a preliminary injunction. As discussed below, the motion for a preliminary injunction is denied, and the government may implement its plan to increase the release of water.

FACTUAL BACKGROUND

The dispute in this lawsuit concerns the Lost River within the Klamath Project. Although Upper Klamath Lake is the principal source of water for the Project, lands in the Project have also received water deliveries from the Lost River, including water stored in Clear Lake and Gerber Reservoirs. The Lost River lies within a closed basin. The Klamath River flows out of Upper Klamath Lake at the Link River Dam and eventually empties into the Pacific. Project diversion works connect the Lost River to the Klamath River.

The Bureau of Reclamation must deliver water to Project irrigators in accordance with the rights held by the United States in the Project and the irrigators' individual repayment contracts, subject to the availability of water. Plaintiffs are two irrigation districts located on the Project's east side in the Lost

River basin. The Plaintiffs have rights pursuant to their contracts with the Bureau to receive water appropriated by the Bureau.

Inflow into Upper Klamath Lake is currently only approximately 50% of the long-term average for this time of year. The government estimates that the irrigation districts and national wildlife refuges on the western side of the Project, which generally receive water deliveries from Upper Klamath Lake, are facing a shortage of 40,000 acre feet of water from that source during the remainder of the season. Between March and April of this year, the forecast for April to September inflow into Upper Klamath Lake dropped from 512,000 acre feet to 397,000 acre feet. The forecast continues to deteriorate.

Clear Lake Reservoir, on the other hand, retains ample water from recent wet winters. The elevation of Clear Lake on August 15, 2000, was 4533.25 feet or four feet higher than average. According to the government, with normal irrigation releases for the remainder of the season, the elevation of Clear Lake would drop to about 4532.0 feet.

Upper Klamath Lake and Clear Lake Reservoir are occupied by two species of sucker fish—the Lost River and shortnose suckers. The sucker fish were listed an endangered in 1988. Based upon 1992 and 1994 biological opinions, the U.S. Fish and Wildlife Service currently considers 4139.0 feet of elevation as the minimum level to meet the need of the sucker species in Upper Klamath Lake. The low-range elevation for Upper Klamath Lake for September 30 each year is 4139.0 feet.

Downstream and west of the Project area, the Klamath River in California provides habitat for the Southern Oregon/Northern California coast coho salmon evolutionary significant unit which was listed as a threatened species in 1997. The Service believes that proper instream flows in the

river form an important component of the species' habitat needs. The Government asserts that it must manage the Project in accordance with the RSA mandate to protect the sucker and coho.

The government asserts that the Project must also address the Secretary of the Interior's trust obligations to protect tribal rights and resources which include both species of suckers for the Klamath Tribes and the coho for the tribes in the Klamath basin.

On April 18, 2000, the Bureau convened a meeting of district managers in the Project to address the management of limited water supplies during this irrigation season. The use of Clear Lake and Gerber Reservoirs was discussed to alleviate the shortfalls in water supplies from Upper Klamath Lake for irrigation purposes. On April 26, 2000, a plan was issued. The plan specifies minimum target instream flows to be maintained in the Klamath River and certain target elevations for the Upper Klamath Lake to protect threatened coho and endangered sucker fish. Water that is available and not needed to maintain stream flows or lake elevations may then be diverted to the Project for delivery to water users. The plan advised users that this would be a drier than average water year. The plan states that stored water from Clear Lake and Gerber Reservoirs is available for use in other project areas in the event a shortage occurs. The plan also states that potential effects of using additional waters from the reservoirs would be considered prior to taking action.

The Bureau estimates that the elevation of Upper Klamath Lake by the end of September will be below the levels established by the 2000 plan if current water user demands and instream flow remain unchanged. On August 15, 2000, the elevation of the Upper Klamath Lake was 4140.06 feet and forecast to drop to between 4138.40 and 4138.67 feet at present irrigation demand and instream flows at the end of

September. The net effect is a forecast shortfall of up to 40,000 acre feet of water by the end of September.

On August 16, 2000, the Bureau drafted a paper discussing the shortfall. The Bureau considered a few options and determined that release of water from Clear Lake was the best way to make up for the shortfall. The Bureau prepared an environmental assessment (EA) to consider potential impacts of three viable alternatives (curtailment of water deliveries, continuation of current deliveries from Upper Klamath Lake, and releases from Clear Lake). The Bureau determined that releases from Clear Lake would not jeopardize the continued existence of the suckers or the threatened bald eagle because the Service believes that even with the releases, elevations in Clear Lake would still be approximately 10 feet above the minimum levels previously determined to be necessary to project the lake's sucker population. Thus, the Bureau determined that the proposed action would not result in significant environmental impacts and determined in a finding of no significant impact (FONSI) that no environmental impact (EIS) statement was required.

On August 21, 2000, water users were informed that implementation of the decision would begin that week. Plaintiffs were informed that they would continue to receive their full supply of water for the remainder of the irrigation season.

On Friday, August 25, 2000, the Bureau commenced limited releases of Project water (based on Judge Coffin's ruling) from Clear Lake Reservoir in the Lost River basin in the eastern side of the Project. The Bureau plans to continue those releases through the end of September to the Tule Lake and Klamath Irrigation districts to meet projected demands through the end of the current water year. The government will monitor the releases and plans to potentially increase the releases to 600 c.f.s.

STANDARDS

In seeking a preliminary injunction, plaintiffs must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in their favor. The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly. Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991). For purposes of injunctive relief, serious questions refers to questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo. Id. Serious questions are substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation. Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the merits. Id.

Even if the balance of hardships tips sharply in plaintiffs' favor, however, it must be shown as an irreducible minimum that there is a fair chance of success on the merits. Stanley v. University of Southern California, 13 F.3d at 1313, 1319 (1994). Moreover, the public interest must be considered where the relief sought by the applicant might affect the public. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (where an injunction is requested which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff).

DISCUSSION

Although plaintiffs attempt to characterize the challenged action as a new operational regime for Clear Lake and Gerber Reservoir, the government has only proposed a limited action to release additional water from Clear Lake Reservoir for a little over one month.[1] Defendants assert that the Bureau is developing a long-term plan for future Project operations pending completion of the Oregon Klamath adjudication and is preparing an EIS on that plan.

It should also be noted that the Klamath Project is a single integrated reclamation project consisting of several facilities and two river basins. Accordingly, the Bureau appropriated water in both river basins for the Project as a whole.

Plaintiffs assert that: (1) Defendants' operational plan for Clear Lake and Gerber Reservoirs violates the water supply contracts of both LVID and HID; (2) the plan is incompatible with Oregon water law and violates the Reclamation Act; (3) the proposed releases are contrary to the authorizing legislation for the Klamath project; (4) the Bureau's decision is arbitrary and capricious and contrary to law; and (5) the plan constitutes a public and private nuisance.

---

[1] The Bureau is preparing a long term plan for Project operations pending completion of the Oregon Klamath adjudication. The government will prepare an EIS and a record of decision will be issued when appropriate. The significance of an agency action cannot be avoided by terming an action temporary or by breaking it down into small component parts. See Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985). The court is satisfied that the current limited release is separate from the long term plan and does not constitute an impermissible piecemeal decision. The Bureau currently has no plans with regard to Clear Lake Reservoir releases beyond September 30, 2000.

1. Defendants' Operational Plan for Clear Lake and Gerber Reservoirs and the Water Supply Contracts of LVID and HID

LVID and the government entered into their most recent water supply contract in 1965. Plaintiffs claim that farmers rely on irrigation under the contract for over 16,000 acres. Article 2 of the contract provides

> The United States will impound, store, or otherwise provide water from Clear Lake Reservoir and Gerber Reservoir for the irrigation of lands in the District, and, to the extent such water can be made available, deliver water to the District at Miller Creek Diversion Dam on Miller Creek and Malone Diversion Dam on Lost River.

Contract attached to McCarley Declaration (#8) at Exhibit 1, Art. 2. Plaintiffs argue that the contract does not provide for storage in any other reservoir, including Upper Klamath Lake.

The contract provides that in the event of a shortage in the quantity of water available to the district, no liability accrues against the United States arising from such shortage nor shall any payment be reduced. Id. at Art 8(a). During periods of water shortage, the government reserved the right to apportion the available water supply among the District and others entitled under the then existing contracts to receive water from the same water supply. Id. at Art 8(b).

Plaintiffs state that there currently is no water shortage in the Reservoirs, the only sources of water available for delivery to the district under the contract. Plaintiffs contend that the water elevation in Clear Lake is relatively high, but it is low in the Upper Klamath Lake where the Bureau has released water to protect downstream coho. Thus, plaintiffs argue, there is no shortage sufficient to authorize defendants to apportion water from Clear Lake Reservoir. Therefore, the government's attempt to divide water in Clear Lake between LVID and

others in the vicinity is a breach of the contract according to plaintiffs.

Reclamation contracts are not immune from subsequent congressional legislation. Klamath Water User' Association v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 2000). Thus, statutes such as the ESA may alter how the government proceeds under existing reclamation contracts.

The LVID contract in this case does not provide that LVID is the exclusive beneficiary of water from Clear Lake and Gerber Reservoirs. The contract provides that the United States agrees to provide LVID with water from Clear lake limited to a quantity of water needed for beneficial use on a fixed number of acres. There appears to be no provision in the contract that gives LVID a right to carryover storage. Furthermore, the contract provides at Article 8(b) that in times of water shortage the government reserves the right to apportion the water supply among the district and others entitled under then existing contracts. The contract does not specify that the shortage must be only in Clear Lake or Gerber Reservoirs. It appears that construing the contract in this manner would render the phrase "among the district and others" meaningless. The Tule Lake Irrigation District and the Klamath Irrigation District are entitled to water from the Lost River and thus it would appear that the contract authorizes apportion to these districts in the event of a shortage. A shortage has occurred at Upper Klamath Lake and therefore, the government does not appear to have violated the contract provisions with LVID and HID in this respect.

HID and the government entered into their most recent contract in 1957. The contract serves more than 10,000 acres of farmland. The District is entitled to 4,200 acre-feet of storage in Clear Lake, 3,685 acre-feet of water diverted from Lost River, and a continuous flow of .59 c.f.s from the Lost River within the boundary. ¶¶ 3-5, HID Contract (attached to McCoy's Declaration (#10) as Exhibit 3. The HID contract

also prevents liability from accruing upon the United States in the event of shortage, but requires the United States to use all reasonable efforts to guard against such shortage. Id. at ¶ 14.

Plaintiffs contend that the government is violating the contract by "importing" a shortage at Upper Klamath Lake to Clear Lake Reservoir.

Plaintiffs also argue that the government's proposed actions to release water from Clear Lake and its lack of effort to prevent a shortage is also a breach of the implied covenant of good faith and fair dealing. See Orange Grove Irrigation District v. United States, 28 Fed. Cl. 790, 797 (1993) (interpret reclamation contracts in a way that will effectuate the spirit and purpose of the contract.

However, the contract specifically refers to shortages in Project reservoirs, not simply Clear Lake and Gerber Reservoirs. A limited release from Clear Lake, to mitigate the effects of a shortage in Upper Klamath lake, beyond the irrigation needs of plaintiffs (in the current water year) does not violate this provision. Indeed, the government must direct operations of the Link River Dam consistent with its ESA and tribal trust obligations. Patterson, 204 F.3d at 1213-14. The limited action does not violate the spirit and purpose of the HID contract and appears to result in no injury to plaintiffs.

At this time, plaintiffs cannot demonstrate a likelihood of success on the merits of the breach of contract claim.

2. Defendants' Plan's compatibility with Oregon Water Law

Plaintiffs claim that the stored water in Clear Lake and Gerber Reservoirs have only been put to the beneficial use of the LVID and HID and therefore the Tule Lake and Upper Klamath Lake irrigators have no right under Oregon law to the water stored there because the Tule and Upper Klamath irrigators have not perfected the "inchoate" right to use Lost River water.

Under federal reclamation law, the terms upon which project water can be put to use and the manner in which rights to continued use can be acquired is fixed by the United States. In Section 8 of the Reclamation Act, the Secretary is required to proceed in conformity with state laws with respect to the control, appropriation, use, or distribution of water used in irrigation so long as such laws are consistent with directives of Congress. See California v. United States, 438 U.S. 645 (1978).

In 1904 and 1905, the United States posted notices of its intention to appropriate all waters of the Klamath and Lost River basins in California and Oregon pursuant to the Reclamation Act and to develop the Congressionally authorized Klamath Project. The United States' water rights in the Lost River remain unadjudicated under state law. See 1918 Lost River Decree (Klamath County Circuit Court), at Section V. The decree at that time recognized that the United States' water rights would be perfected in the future. A determination of the extent to which the federal rights have been perfected under state law will have to be determined when a proper proceeding is initiated under the McCarran Amendment, 43 U.S.C. § 666. Plaintiffs do not point to any authority suggesting that the United States has now lost its ability to continue to perfects its water rights for the project.[2] Furthermore, although westside lands do not normally receive

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[2] The plaintiffs' chief concern with the government's action is that it will create a right for west side irrigators equal to their storage rights in Clear Lake Reservoir. The court expresses no opinion as to the effect of this action under state law beneficial use doctrine. However, to the extent that the plaintiffs are correct that the Government has lost its ability to perfect the water rights, then the government's present action does not result in the perceived threat to plaintiffs. At this time, the government's water rights in the Project remain unadjudicated under state law.

water from direct releases from Clear Lake and Gerber Reservoirs, they do receive water from the Lost River on an annual basis and have since the inception of the Project. Therefore, there appears to be no valid basis for the argument that the United States has lost its inchoate right to use Clear Lake storage water to irrigate the Tule Lake area.

Plaintiffs next contend that even if the inchoate rights are not lost, the government may not "enlarge" its right beyond those uses specifically provided for under the 1918 Lost River Decree. The Bureau is not bound by the Decree. The Klamath County court lacked jurisdiction over the Unite States.[3] In addition, the federal water rights recognized in the Lost River Decree were based upon plans at the inception of the Project which were acknowledged to be subject to change as the Project developed and water rights were perfected. Prior to the 1952 McCarran Amendment, the United States had not waived its immunity in regard to state general adjudications of water rights and therefore was not bound by decrees issued pursuant to such adjudications. See Mannatt v. United States, 951 F.Supp. 172 (E.D. Cal 1996).

Plaintiffs next argue that the Oregon water code prohibits the releases contemplated by the Bureau at, least before obtaining approval. However, the United States' water rights for the Klamath Project predate the Oregon Water Rights Act of 1909. Thus, the code does not control. See ORS 539.010(3) and (4).

The Bureau is free under Oregon law as it existed prior to 1909 to use its water rights in any manner it determines necessary so long as such use does not result in injury to other

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[3] Indeed, the Circuit Court of Oregon for Klamath County recently granted the United States motion to dismiss a petition to reopen the Lost River Decree brought by these same plaintiffs. See Case No. 1918 001 WR (Klamath County Circuit Court, May 12, 2000).

water right holders. See Russell-Smith v. Water Resources Department, 152 Or. App. 88, 96 (1998). A change in point of diversion or place of use could be made when it does not prejudice the rights of others. Id.

Plaintiff does contend that the releases of up to 600 c.f.s. from Clear Lake Reservoir pose a risk to public health and safety. However, the government notes that summer flows of 600 c.f.s. have been exceeded in the past because of Clear Lake operations or summer precipitation without adverse consequences to water quality. Moreover, the FONSI has mitigation measures to protect groundwater quality.

At this time, plaintiffs have not shown a likelihood of success on the merits of their claim that the Bureau's action violates state law.

3. The Proposed Release and the Authorizing Legislation for the Klamath Project

Plaintiffs argue that the purpose of the Klamath Project, pursuant to the Reclamation Act, is irrigation and reclamation. Plaintiffs contend that the purpose of the Bureau's releases of water from Clear Lake into the Tule Lake is primarily to benefit fish and wildlife and is thus not permitted under the Project's authorizing legislation. However, the Ninth Circuit has already held that the ESA applies to agency action pursuant to the Reclamation Act. See, e.g., Peterson [sic], 204 F.3d at 1213 (Because Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators.)

Therefore, plaintiffs have not shown a likelihood of success on the merits of their claim that the Bureau is violating Project purposes.

4. The Bureau's Decision and NEPA and ESA

Plaintiffs challenge the adequacy of the government's August decision to release water from Clear Lake. Plaintiffs contend that the decision to release water from Clear Lake was arbitrary and capricious under the APA, failed to provide adequate notice, and failed to follow the procedures outlined by NEPA and the ESA.

Plaintiffs argue that defendants failed to provide adequate notice for the proposed action. Plaintiffs first assert that defendant was required to publish notice in the federal register, 40 C.F.R. § 1506.6(b)(2) requires notice for actions with effects of national concern. Plaintiffs contend that the government's own EA notes that the incidental take of sucker fish from Clear Lake as a result of the action is 1000 fish and that therefore this is an action of national concern. However, this is merely an operation to release water in a local reclamation project. The Bureau is nonetheless required to provide public notice to procure local involvement of those who may be interested in the action. 40 C.F.R. § 1506.6

Plaintiffs assert that they did not get notice until a few days before the action was to commence. However, the Bureau sent its 2000 plan out on April 26, 2000, which stated that potential effects of using additional water from the reservoirs would be considered prior to taking such action. The draft discussion paper released to the public, including plaintiffs, on August 16, stated that use of Lost River supply will require analysis of environmental impacts. Plaintiff should have been aware that the Bureau intended to prepare an EA prior to issuing a decision.

There does not appear to be any regulations that prohibit the preparation of an EA over the course of a few days. Although, this may help to demonstrate that the agency made the decision in an arbitrary and capricious manner, plaintiffs do not

demonstrate at this time that the decision was arbitrary and capricious.

Plaintiffs claim that the Bureau was required to issue the FONSI thirty days prior to taking action. However, this regulation only applies in certain limited circumstances such as when the proposed action is without precedent or is closely similar to an action that would normally require an EIS. See 40 C.F.R; § 1501.4(e)(2). Releasing water from a reservoir is not unprecedented. The action is limited in duration and will not lower Clear Lake to a level determined to be harmful to the sucker population.

Plaintiffs contend that it is fundamentally irrational to "kill 1000 endangered fish" in one lake to raise the water level of another Lake. Thus, plaintiffs argue the action is arbitrary and capricious in violation of the APA.[4] The Bureau did not "decide to kill 1000 endangered fish" This is incidental to the agency's decision and the incidental take findings were necessary to determine if an EIS was necessary.

Plaintiffs argue that neither the biological opinions nor the EA offer any evidence that missing the Upper Klamath Lake elevation targets by a few inches will have any adverse impact on the sucker population. This court did previously invalidate RPA's with respect to Clear Lake and Gerber reservoirs with respect to minimum elevation levels. See Bennet v. Badgley, Case No. 93-6076-HO, at p.6. (April 13, 1999). However, the Court did not address minimum lake levels for the Upper Klamath and the impact on the sucker fish there. At this point

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[4] This claim appears better suited to the ESA. The ESA requires 60 days written notice of the alleged violation before suit may be brought. 16 U.S.C. § 1540(g)(1)(A). Plaintiffs have not provided such notice. At this point in the proceedings, the court will review the claim as properly raised under the APA.

in the proceedings and in light of the lack of present harm to plaintiffs, plaintiffs' assertions do not support an injunction.

Plaintiffs next argue that the Bureau has failed to take a "hard look" at the environmental consequences of the water release. Plaintiffs mostly rely on the 1994 biological opinion finding that minimum lake elevations are necessary to protect sucker populations in Clear Lake. However, the proposed action will maintain Clear Lake well above the minimum levels considered necessary by the 1994 biological opinion.

Plaintiffs then speculate about a parade of horribles that may befall various species and people as a result of the increased flow in the river and lowered lake levels. The decision wasn't simply based on a weekend look into the decision but also drew upon the 1992 and 1994 biological opinions and experience with river flow in the Project.

Plaintiffs next contend that the analysis of the Bureau was arbitrary and capricious because it only considered a one-time release. However, the agency is only taking action with respect to this one release of water form Clear Lake. The Bureau is attempting to prepare an EIS with respect to future management of the Project.

Plaintiffs next contend that the Bureau arbitrarily and capriciously rejected alternatives to the proposed action. However, plaintiffs do not show any alternative that would maintain the level of Upper Klamath in such a short period of time. The Bureau has determined that this is the best way to proceed at this time and it appears to be rationally related to the evidence before it.

In sum, it appears that plaintiffs are not likely to succeed on their claim that the Bureau's reliance on the expertise of the Wildlife Service was arbitrary and capricious. The Bureau through consultation with the Service appears to have adequately considered potential impacts and determined that release of the water from Clear Lake Reservoir will have no

significant impact. This is especially true given the limited duration of the project and the fact that Clear Lake elevations will remain above minimum levels necessary to prevent jeopardy to endangered fish. See Wirkus Declaration (#19) at Exhibit B (Biological assessment and Biological opinion considered effects on water supply, threatened and endangered species, wildlife refuges, water quality, Lost River flood plain, tribal resources, water rights, and cultural resources).

5. Public and Private Nuisance

Plaintiffs argue that the Bureau's action creates a public and private nuisance pursuant to state law. However, plaintiffs have failed to exhaust administrative remedies for this tort claim. The claims must be dismissed for lack of jurisdiction. See McNeill v. United States, 508 U.S. 106, 112-13 (1993). Furthermore, the action will only reduce Clear Lake reservoir by 1.8 feet more than otherwise would occur on account of irrigation releases. Thus, plaintiffs' water rights will not be affected because plaintiffs will still be able to receive all of their irrigation needs for the water year.

6. The Balance of Hardships

If the proposed action is enjoined it is likely that farmers on the west side of the Project will suffer harm in that water deliveries may be curtailed by as much as 50%. Wildlife in the Tule River area could suffer as well. If the injunction is denied on the other hand, plaintiffs' irrigation activities will continue undisturbed for the remainder of the season and plaintiffs have not demonstrated any adverse impacts for future water seasons. Furthermore, while the incidental take provision indicates that up to 1000 endangered fish may be effected, this does not tip the scales in plaintiffs' favor.

7. The Public Interest

In the Bureau's determination, it concluded that the proposed action will support the continued well being of

endangered and threatened species, support the irrigation activities of farmers on the west side of the Project, and support wildlife. Denial of the injunction would likely have a detrimental impact, especially with regard to farming activities.

Accordingly, even if plaintiffs could demonstrate a likelihood of success on the merits of one or more of their claims, they do not demonstrate that the balance of harms and public interest favors an injunction.

CONCLUSION

For the reasons stated above, plaintiffs' motion for a preliminary injunction (#6) is denied.

DATED this 31st day of August, 2000.

/s/ Michael R. Hogan
United States District Judge